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The factual record developed by Petitioner Kenneth T. Richey ("Richey") in this case, in combination with the controlling law, requires that this Court permit Richey to present evidence at an evidentiary hearing. The law requires an evidentiary hearing because Richey has presented facts which, if accepted as true, demonstrate that he is entitled to relief.

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

Townsend v. Sain, 372 U.S. 293, 312-13 (1963).

Because the state post-conviction court refused to hold an evidentiary hearing to consider Richey's substantial new evidence, an evidentiary hearing before this Court is required. In further defining this standard, the Supreme Court enunciated a non-exhaustive list of six situations requiring an evidentiary hearing:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not

> afford the habeas applicant a full and fair fact hearing.

Id. at 313.[1] Because Richey meets all six factors, an evidentiary hearing is required.

1. Richey is Entitled to An Evidentiary Hearing to Present His New Scientific Evidence Demonstrating the Falsity of the Scientific Evidence Relied Upon at His Trial.

At the very least, Richey is entitled to an evidentiary hearing to present his new evidence concerning the falsity of the scientific evidence that the trial court relied upon to convict him. At trial, three witnesses testified on behalf of the State in support of the conclusion, allegedly based upon scientific analysis, that the fire at Hope Collins' apartment on June 30, 1986, was caused by arson. Assistant State Fire Marshal Robert Cryer testified that in his inspection of the apartment, he identified three characteristics which he testified were exclusively caused by ignitable liquids. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 760. Daniel Gelfius, a technician with the Ohio Arson Crime Laboratory ("OACL"), testified that three of the nine samples provided by Cryer for testing at the OACL contained ignitable liquids — a piece of carpet and wood from the deck contained paint thinner and another piece of carpet contained gasoline. Trial Testimony, Dan Gelfius, Petitioner's Checklist, Tab 3, at 836. Finally, L. Gregory DuBois, who was originally retained by Richey's counsel to analyze the evidence of arson, testified

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[1] The Supreme Court has since modified the fifth *Townsend* factor, requiring a petitioner to demonstrate cause and prejudice for his failure to develop facts in state court. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-12 (1992). Congress has since further modified this standard. *See* 28 U.S.C.A. § 2254(e)(2) (West Supp. 1999).

that he concurred with the testimony of the State's witnesses despite the fact that he had not conducted his own analysis of the evidence. Trial Testimony, Gregory DuBois, Petitioner's Checklist, Tab 3, at 821.

Richey's new scientific evidence includes the affidavits of Professor Richard L. P. Custer, a nationally recognized fire investigator, and Andrew T. Armstrong, Ph.D., a Certified Professional Chemist specializing in forensic science and the testing, detection, and identification of flammable liquids in fire debris. The affidavit of Professor Custer establishes that, according to sound scientific principles, none of the physical evidence relied upon by Cryer is in fact evidence of arson. Indeed, Professor Custer concludes that the evidence actually supported a conclusion that the most likely cause of the fire was the careless discard of smoking materials. The affidavit of Dr. Armstrong establishes that, contrary to the conclusions of the Ohio Arson Crime Laboratory, none of the samples of debris taken from the fire scene contain evidence of an ignitable liquid according to current scientific criteria, or even according to the less accurate standards used by the Ohio Arson Crime Laboratory in 1987. Despite Richey's attempt to present his new evidence to the state court during post-conviction proceedings, that court refused to hold an evidentiary hearing. To date, no court has heard, let alone ruled on, Richey's new evidence.

Resolving the conflicts concerning the scientific testimony of arson is an essential prerequisite for this Court to rule upon Richey's legal claims. For example, Richey has presented to this Court claims of (1) actual innocence and (2) ineffective assistance of trial counsel, and neither issue can be decided without resolving the conflicts about the scientific testimony of arson.

A. Richey's Substantive and Procedural Claims of Actual Innocence Require an Evidentiary Hearing.

In his Petition, Richey states that he is being unconstitutionally detained because he is actually innocent of the crime for which he sits on death row. *See Herrera v. Collins*, 506 U.S. 390, 418, 419, 430 (1993) (O'Connor, J., concurring, joined by Kennedy, J., and Blackmun, J., dissenting, joined by Stevens and Souter, JJ.). The Petition also makes clear that Richey relies upon actual innocence not only as a substantive claim, but also as a procedural gateway to avoid any procedural bars raised by the State to consideration of any of Richey's substantive claims. *See Schlup v. Delo*, 513 U.S. 298, 313-17 (1995). To resolve Richey's substantive and procedural claims of actual innocence, this Court must hear live, in-person testimony from witnesses concerning the scientific evidence of arson.

The Supreme Court has noted the need for a district court to hold an evidentiary hearing to consider new evidence of actual innocence. A credible claim of actual innocence necessarily requires the presentation of new evidence. "To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence — whether it be ***exculpatory scientific evidence***, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *Id.* at 324 (emphasis added). To succeed on his procedural claim of actual innocence, Richey "must show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt [in light of the new evidence]." *Id.* at 327.[2] As the Supreme Court has made clear,

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[2] To succeed on his substantive claim of actual innocence, Richey must demonstrate that his new evidence "unquestionably establish[es]" his innocence. *Schlup*, 513 U.S. at 317.

this determination must be made based not only on the evidence presented at trial, but also on any new evidence obtained by the Petitioner.

> [T]he emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the [*Murray v. Carrier*, 477 U.S. 478 (1986)] standard, we believe that Judge Friendly's description of the inquiry is appropriate: The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial."

Id. at 327-28.

In making this determination, the habeas court is empowered, indeed required, to make credibility determinations. "[U]nder the gateway standard... the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Id.* at 330. Such credibility determinations can only be made at an evidentiary hearing where the witnesses in question testify before the district court.

> Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure, the state-court record is competent evidence, and either party may choose to rely solely upon the evidence contained in that record, but the petitioner, and the State, must be given

> the opportunity to present other testimonial and documentary evidence relevant to the disputed issues.

Townsend, 372 U.S. at 322 (internal citation omitted); *see also Zilich v. Reid*, 36 F.3d 317, 32123 (3d Cir. 1994) (requiring evidentiary hearing to resolve credibility issues in federal habeas petition). In *Schlup*, for example, the Supreme Court remanded with implicit instructions to hold an evidentiary hearing.

> The fact-intensive nature of the inquiry, together with the District Court's ability to take testimony from the few key witnesses if it deems that course advisable, convinces us that the most expeditious procedure is to order that the decision of the Court of Appeals be vacated and that the case be remanded to the Court of Appeals with instructions to remand to the District Court for further proceedings consistent with this opinion.

Schlup, 513 U.S. at 332;[3] *see also Bousley v. United States*, 523 U.S. 614, 623 (1998) (remanding case to the district court

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[3] Even the three Justices who dissented in *Schlup* would grant an evidentiary hearing on the facts presented in this case:

> But in the highly unusual case where the district court believes on the basis of written submissions that the necessary showing of "actual innocence" may be made out, it should conduct a limited evidentiary hearing at which the affiants whose testimony the court believes to be crucial to the showing of actual innocence are present and may be cross-examined as to veracity, reliability, and all of the other elements that affect the weight to be given the testimony of a witness. After such a hearing, the district court would be in as good a position as possible to make the required determination as to the showing of actual innocence.

Schlup, 513 U.S. at 341-42 (Rehnquist, C.J., dissenting, joined by Kennedy & Thomas, JJ.).

to allow Petitioner "to attempt to make a showing of actual innocence" sufficient to allow Petitioner to go through *Schlup*'s procedural gateway).

B. Richey's Claim of Ineffective Assistance of Trial Counsel Requires an Evidentiary Hearing to Resolve Disputes Concerning the Scientific Evidence of Arson.

An evidentiary hearing to consider new evidence concerning the scientific evidence of arson is similarly required to resolve Richey's claim of ineffective assistance of trial counsel. To demonstrate ineffective assistance of counsel, Richey must meet the standard enunciated in *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984).

> To obtain relief on such a ground, he must show both that his counsel's performance "fell below an objective standard of reasonableness" and that he was prejudiced as a result.

Glenn v. Tate, 71 F.3d 1204, 1206 (6th Cir. 1995) (quoting *Strickland*, 466 U.S. at 687-88). An evidentiary hearing at which Petitioner presents scientific evidence concerning arson is required to allow Richey to demonstrate both the unreasonableness of counsel's actions and the prejudice that resulted.

As to the reasonableness of the actions of Richey's trial counsel, Richey maintains that trial counsel did not adequately investigate the State's alleged scientific evidence of arson and that, had counsel reasonably investigated, he would have uncovered evidence demonstrating the falsity of the state's evidence of arson. *See Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) ("If the attorney had investigated further, he would have discovered objective medical evidence casting substantial doubt on the victim's story, and witnesses who could confirm the medical evidence."). Moreover,

counsel failed adequately to inform and work with the expert he did obtain. *See Glenn*, 71 F.3d at 1210 n.5 ("[D]efense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant.").

The Sixth Circuit has recognized that in analyzing the reasonableness of trial counsel's actions, the court should consider the evidence developed by counsel during post-conviction proceedings; such evidence serves as a baseline to establish what effective counsel could have developed at trial. *See Glenn*, 71 F.3d at 1208 (analyzing the reasonableness of counsel's actions, and observing that "[i]f the lawyers had done what they should have done, they would have been in a position to show the jury" all the evidence developed by post-conviction counsel). Moreover, where, as here, this evidence includes expert testimony, the proper forum for receiving the evidence is an evidentiary hearing. *Id.* (noting that expert testimony had been adduced at post-trial hearing); *Sims v. Livesay*, 970 F.2d 1575, 1577-79 (6th Cir. 1992) (district court held "bench trial" on habeas petition at which petitioner presented two expert witnesses); *Foster*, 9 F.3d at 725 (expert testimony demonstrating facts trial counsel failed to develop presented in evidentiary hearing).

This Court must further resolve disputes concerning the scientific evidence of arson to determine whether Richey can demonstrate prejudice in connection with his claim of ineffective assistance of counsel. "Under the *Strickland* test, the petitioner must show a 'reasonable probability' that, but for his counsel's unprofessional errors, the result would have been different. ... The 'reasonable probability' of which Strickland speaks ... is 'a probability sufficient to undermine confidence in the outcome.'" *Glenn*, 71 F.3d at 1210 (quoting *Strickland*, 466 U.S. at 694). To assess this "reasonable probability," this Court must determine whether Richey has

raised sufficient questions concerning the evidence presented against him at trial, with special focus on the scientific evidence of arson. The Sixth Circuit has noted the propriety of considering new scientific evidence through an evidentiary hearing in determining the prejudice prong of the *Strickland* test. *See Sims*, 970 F.2d at 1581 (analyzing scientific evidence, including testimony of petitioner's new expert at evidentiary hearing, to determine that prejudice prong of *Strickland* had been met).

C. Significant Factual Disputes Exist Concerning the Scientific Evidence of Arson.

Significant factual disputes exist concerning the scientific evidence of arson in this case. As noted above, the State presented three witnesses to testify concerning the scientific evidence of arson at Richey's trial: Cryer, Gelfius and DuBois. Prior to his first state post-conviction petition, Richey retained qualified experts to review the evidence presented against him at trial: Dr. Andrew Armstrong, a forensic scientist with a specialty in the identification of ignitable liquids from fire debris, and Professor Richard Custer, a nationally-recognized expert in fire reconstruction and the determiiiation of cause and origin of fires. Affidavits of these experts were initially presented to the courts for the State of Ohio in Richey's Motion to Vacate or Set Aside Sentence. These affidavits have been provided to this Court as Exhibits 1 and 2 to the Petition for a Writ of Habeas Corpus (the "Petition").

Dr. Armstrong's review of the evidence reveals that the OACL incorrectly determined that the samples taken from the apartment of Hope Collins contained ignitable liquids. Specifically, Dr. Armstrong avers that *none* of the three samples tested by the OACL can be conclusively identified as containing ignitable liquids. *See* Armstrong Affidavit, ¶¶ 14-19 (Exhibit 2 to the Petition). Dr. Armstrong further raises

significant questions concerning the scientific methods utilized by the OACL in its analysis of fire debris. *Id.* at 120.

Similarly, after reviewing all of the evidence relied upon by Mr. Cryer, Professor Custer concluded that the indicia of arson testified to by Mr. Cryer are in fact not evidence of ignitable liquids but can instead be the result of an accidental apartment fire. *See* Custer Affidavit, ¶10 (Exhibit 1 to the Petition). Professor Custer has further opined that, given all of the evidence presented in this case, the fire at Hope Collins' apartment more likely than not was accidental, started by either child's match play or the careless discard of smoking materials.[4] *Id.* at ¶¶ 12-13. Finally, after reviewing the evidence about the smoke detector and running computer simulations of the fire, Professor Custer has concluded that the smoke detector may likely have melted during the fire and thus fallen from the ceiling. *Id.* at ¶ 12(e).

In discovery in this federal habeas action, Richey has further developed evidence that calls into question the conclusions relied upon to convict him. Much of the discovery in this habeas proceeding has focused on the State's "scientific" testimony about arson. Richey has deposed the OACL, through its designees Mohamed Gohar and Daniel Gelfius, the Assistant State Fire Marshal, Robert Cryer,[5] and the expert initially obtained by Richey's trial defense team,

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[4] There is significant evidence of both Cynthia Collins' history of playing with fire and Hope Collins' history of careless discard of smoking materials to support either of these scenarios. *See, e.g.*, Exhibit 1, Hope [Collins] Sterling Deposition, June 23, 1999, ("Collins Deposition") at 55-56, 78-80.

[5] Although Mr. Cryer would possess important information, his deposition reveals that he has little or no memory of the investigation in this case. Exhibit 3, Robert Cryer Deposition, June 16, 1999 ("Cryer

Gregory DuBois. The Respondent has deposed both Dr. Armstrong and Professor Custer. Furthermore, the Respondent designated Mr. Gohar as an expert for these proceedings and provided a report. In his report, Mr. Gohar specifically challenges the conclusions of Dr. Armstrong and proclaims Dr. Armstrong's statements to be "false." *See* Exhibit 2, Affidavit of Mohamed M. Gohar, June 2, 1999. Following his designation and preparation of his report, Mr. Gohar was then deposed in his capacity as Respondent's designated expert.

Discovery has identified many significant factual questions that must be resolved by this Court.[6] For example, discovery has revealed that Cryer presented false testimony at Richey's trial concerning the conclusions of the OACL, yet Richey's trial counsel failed to expose this falsehood. During his trial testimony, Cryer was questioned concerning his beliefs about the reliability of any samples from the carpet in light of its history, i.e., its removal from the apartment, deposit at the county landfill, recovery by the Sheriff's Department and placement in the parking lot near the gasoline pumping station before any samples were taken. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 792-93, 806. Cryer testified that, although this history raised some question about the reliability of findings from the carpet samples, any questions were allayed by his belief that the OACL identified the same paint thinner on both the carpet

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Deposition"), at 26-31. Therefore, although Petitioner would generally seek to present all relevant participants in an evidentiary hearing, Petitioner acknowledges that the testimony of Mr. Cryer would be without value.

[6] The listing of factual disputes herein is not comprehensive, but is merely intended to demonstrate the variety and types of questions this Court will need to resolve concerning the scientific evidence of arson.

and the deck, thus confirming the reliability of the carpet samples. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 806. Discovery, however, has disclosed that Cryer's belief about the OACL findings was simply wrong. Both Mohamed Gohar and Dan Gelfius testified that as of 1986, and today, the OACL *could not* and *did not* identify the paint thinner on the deck and on the carpet as the same. *See* Exhibit 4, Mohamed Gohar Deposition ("Gohar Deposition"), vol. III, June 15, 1999, at 338; Exhibit 5, Dan Gelfius Deposition ("Gelfius Deposition"), vol. II, June 17, 1999, at 204-05. Thus, crucial evidence presented at trial about the reliability of central physical evidence against Richey was demonstrably false according to the State's own witnesses, yet the falsity of this evidence was not exposed to the trial court.

Other disputes concern the reliability and scientific propriety of the methods and equipment utilized by the OACL. The OACL identifies ignitable liquids in gas chromatographs, generated through the use of a packed column, on the basis of "pattern recognition." Exhibit 6, Gohar Deposition, vol. I, May 25, 1999, at 35-36. That is, the technician compares the pattern obtained from testing a sample of fire debris with known patterns obtained from ignitable liquids to determine whether a sufficient match exists to decide that the ignitable liquid is present in the fire debris. *Id.*

However, the standard utilized by the OACL to determine that a sufficient match exists is scientifically unacceptable. Thus, the OACL does not rely upon the scientifically accepted portion of the gas chromatograph to identify gasoline. *Compare* Exhibit 7, American Society for Testing and Materials Standard E 1387-95, "Standard Test Method for Ignitable Liquid Residues in Extracts from Fire Debris Samples by Gas Chromatography," § 10.3.2 (requiring presence of "C3 alkylbenzene four-peak group" for positive

identification of gasoline) (hereinafter "ASTM Standard E 1387-95") *with* Exhibit 4, Gohar Deposition, vol. III, June 15, 1999, at 309-310 ("In 1986, did the laboratory require that the compound in the C3 alkylbenzene group be present in an unknown sample in the same relative concentrations as those same compounds in the C3 alkylbenzene group in a gasoline standard before the laboratory would find that the unknown contained gasoline? A. No."). Moreover, rather than requiring a consistent, matching pattern for positive identification of ignitable liquids, the OACL repeatedly attempts to explain away any differences between the known and unknown samples based on either the accumulation of pyrolytic products or evaporation of more volatile compounds. *See, e.g.*, Exhibit 4, Gohar Deposition, vol. III, June 15, 1999, at 271-74. Although published and generally accepted scientific standards today explicitly note the difficulty of differentiating burned carpet from gasoline, *see* Exhibit 7, ASTM Standard E 1387-95, § 10.3.2.1 ("The mere presence of these alkylbenzenes does not justify an identification of gasoline. The compounds must be present at approximately the same relative concentrations as are observed in samples of known gasoline. Many carpet samples that have been exposed to fire conditions contain these compounds in some concentration."), the OACL continues to insist that its methodologies are superior to any others and that, despite inconsistencies between the OACL and generally accepted methodologies, the OACL results are still reliable, Exhibit 4, Gohar Deposition, vol. III, June 15, 1999, at 278-79, 312; Exhibit 8, Mohamed Gohar Expert Deposition, July 15, 1999 ("Gohar Expert Deposition"), at 61. Furthermore, an important aspect of gas chromatographic data is known as "retention time." Armstrong Affidavit, ¶ 11 (Exhibit 2 to the Petition). Scientific standards require that differences in retention times between known and unknown samples be less than 15 to 20 seconds to positively identify the unknown

sample, Armstrong Affidavit, ¶ 17(e) (Exhibit 2 to the Petition), yet the OACL accepts differences as great as three Exhibit 9, Gohar Deposition, vol. II, May 26, 1999, at 143-44.

Depositions of the two OACL designees have even revealed that Gelfius and Gohar disagree on significant subsidiary facts that led them to their ultimate conclusions about the presence of ignitable liquids in the samples in the Richey case. In depositions, Petitioner asked about the components of the patterns utilized by the OACL to identify paint thinner and gasoline and how each of those necessary components were identified in the fire debris samples from the fire at issue. *See, e.g.*, Exhibit 9, Gohar Deposition, vol. II, May 26, 1999, at 190-93 (identifying peaks necessary to identify paint thinner on Ex. 15A); Exhibit 9, vol. II, at 200-03 (identifying peaks necessary to identify gasoline on Ex. 16); Exhibit 28, Gelfius Deposition, vol. I, June 8, 1999, at 88-89 & 95-96 (identifying peaks necessary to identify paint thinner on Ex. 19); Exhibit 28, vol. I, at 102-03 (identifying peaks necessary to identify gasoline on Ex. 20). Even though Gelfius and Gohar both worked for the same laboratory, they agreed neither on the criteria to apply in identifying the ignitable liquids nor on how to apply those criteria to the samples from the fire at issue. *Compare* Exhibit 36, Fire Marshal Ex. 16 (showing fourteen peaks Gohar requires to identify gasoline pattern) *with* Exhibit 37, Fire Marshal Ex. 20 (showing seventeen different peaks Gelfius requires to identify gasoline pattern); *also compare* Exhibit 38, Fire Marshal Ex. 15A (showing seven peaks Gohar requires to identify paint thinner) *with* Exhibit 39, Fire Marshal Ex. 19 (showing sixteen peaks Gelfius requires to identify paint thinner). Moreover, when asked to find on the gas chromatograph of the fire debris samples the same peaks that they had identified as necessary in the known samples, Gohar and Gelfius identified different peaks as matching the known sample. For example, on the gasoline standards, Mr. Gohar

has numbered as peak 3 the peak corresponding to Mr. Gelfius' numbered peak 17. *Compare* Exhibit 36, Fire Marshal Ex. 16 *with* Exhibit 37, Fire Marshal Ex. 20. When these standards are applied to the unknown sample, however, Mr. Gohar and Mr. Gelfus, while both claiming to identify this peak on the unknown, label completely different peaks as corresponding. *Compare* Exhibit 40, Fire Marshal Ex. 20 (Gohar's identification of peak 3 from the gasoline standard on the unknown he claims to positively identify as gasoline) *with* Exhibit 41, Fire Marshal Ex. 34 (Gelfius identification of his peak 15 from the gasoline standard as corresponding with Gohar's peak 3 and identification of his peak 17 as corresponding with Gohar's peak numbered 1). Thus, although it initially appeared that Gohar and Gelfius reached the same conclusion, as demonstrated by the reports of the OACL submitted as Exhibits at Richey's trial, discovery has now revealed that these conclusions were reached through differing analyses of the underlying data. This inconsistency calls into question the entire analysis performed by the OACL.

Discovery has also revealed the incorrect bases upon which DuBois agreed with the testimony of the state's trial witnesses. DuBois, during his deposition, identified the same mistaken indicia of arson as those relied upon by Assistant State Fire Marshal Cryer during his trial testimony. Exhibit 10, Laurence Gregory DuBois Deposition, June 22, 1999 ("DuBois Deposition"), at 93-95, 140-41. Thus, DuBois testified that burning in the grooves of the deck was necessarily caused by ignitable liquids. *Id.* However, Professor Custer has explicitly explained that such burning can occur in an accidental, apartment fire in which no ignitable liquids exist. Custer Affidavit, ¶¶ 10(b), 12(c)-(e) (Exhibit 1 to the Petition). Similarly, DuBois testified to identifying burn patterns in the living room of the Collins apartment that could only be explained by ignitable liquids. Exhibit 10, DuBois at 94-97. Again, Custer has explained that

a natural phenomenon known as "flashover" can cause such patterns without the presence of ignitable liquids. Custer Affidavit, 1 10(c) (Exhibit 1 to the Petition). When questioned as to the plausibility Custer's analysis, DuBois acknowledged that he was unfamiliar with the concept of flashover. Exhibit 10, DuBois Deposition, at 138-41. Finally, discovery has revealed DuBois's complete lack of qualifications to analyze fire debris and to identify ignitable liquids through gas chromatography. Exhibit 10, DuBois Deposition, at 39, 118-19.

Significant factual disputes concerning the scientific evidence of arson relied upon to convict Richey exist in light of Richey's new evidence. If Richey's scientific evidence is accepted as true, he is entitled to relief. Thus, this Court must allow the presentation of this evidence during an evidentiary hearing.

II. This Court Must Consider New Evidence Raising Questions Concerning the Reliability of Trial Testimony at an Evidentiary Hearing.

Resolution of Richey's legal claims requires consideration of evidence concerning not only the disputed scientific evidence of arson, but the entire record in this case. This Court must consider the evidence presented against Richey at trial and the questions raised concerning that evidence as developed since trial. *See Schlup*, 513 U.S. at 327-28 (stating that court must consider all relevant evidence in deciding question of actual innocence); *Sims*, 970 F.2d at 1581 (stating that the test for prejudice in an ineffective assistance claim is whether the claim raises a "reasonable probability that the jury's verdict would have been different"); *see also Mapes v. Coyle*, 171 F.3d 408, 427-29 (6th Cir. 1999) (remanding for evidentiary hearing on claim of ineffective assistance of appellate counsel). If permitted by this Court, Richey could present the evidence summarized below. To the

extent the Respondent does not contest these facts, Richey is simply entitled to relief based upon them.

A. The Fire and the Initial Investigation[7]

Early in the morning on June 30, 1986, a fire broke out at the apartment of Hope Collins in Columbus Grove, Ohio. Ms. Collins was not home at the time, but her two year old daughter, Cynthia, was home alone. Tragically, Cynthia died in the fire. The Columbus Grove Fire Department responded to the fire at approximately 4:30 a.m. on the morning of June 30, 1986. Trial Testimony, Don Hoyt, Petitioner's Checklist, Tab 3, at 874. Among the members of the Columbus Grove Fire Department who responded were Leonard Heffner, the Chief of the Fire Department, and Steve Stechschulte, who was also a deputy with the Putnam County Sheriff's Department. Exhibit 11, Stechshulte Deposition, July 2, 1999 ("Stechschulte Deposition"), at 17-19; Exhibit 12, Leonard Heffner Deposition, July 1, 1999 ("Heffner Deposition"), at 26-27. After extinguishing the fire, Chief Heffner called the Assistant State Fire Marshal, Robert Cryer, to investigate the fire because a fatality had occurred. Exhibit 12, Heffner Deposition, at 39-40. Before Mr. Cryer arrived, Chief Heffner attempted to determine the cause of the fire. His initial conclusion was that an electric fan had started the blaze. Exhibit 12, Heffner Deposition, at 3536; Exhibit 13, Report Prepared by Heffner, dated June 30, 1986.

At approximately 6:30 a.m., Mr. Cryer arrived and took control of the scene and the investigation. Mr. Cryer headed

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[7] The facts outlined below come from the trial record and discovery obtained in this federal habeas action. Citations to the trial transcript reference the tabs of Petitioner's Checklist. Citations to evidence obtained in discovery reference the Appendix of Exhibits attached to this Memorandum.

the investigation from the Fire Marshal's Office and Deputy Stechschulte investigated any crimes that arose from the fire for the Putnam County Sheriff's Department.[8] Exhibit 11, Stechschulte Deposition, at 79, 84; Exhibit 14, Deputy Roy Sargent Deposition, May 11, 1999 ("Sargent Deposition"), at 128. Mr. Cryer spent much of June 30, 1986, inspecting the remains of the Collins apartment. *See* Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 732. The fire and fire-fighting process had caused significant damage to the living room of the apartment, and much debris, including insulation from the ceiling, burned furniture and burned carpeting, covered the floor of the apartment. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 791; Exhibit 12, Hef ner Deposition, at 16. During this inspection, Mr. Cryer also made an observation that would later come to have critical importance. Mr. Cryer noted that the smoke detector in the hallway of the Collins apartment was hanging from the ceiling by its wires. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 753, 783. Though proper procedure requires photographing evidence in place before removal, *see* Exhibit 11, Stechschulte Deposition, at 13-14, no photograph was ever taken of the smoke detector. Although Mr. Cryer testified at trial that, by the end of the first day of his investigation he had reason to believe the fire had been started by arson, he took no physical samples on that day. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 783, 789-94. Moreover, Mr. Cryer apparently released the fire scene for cleaning by the owners of the apartment building. Exhibit 11, Stechschulte Deposition, at 97-102; Exhibit 14, Sargent Deposition, at 150-54.

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[8] Tom Miller was the Chief of the Columbus Grove police department in June and July of 1986. His involvement in the investigation was minimal. He has since died. *See* Exhibit 14, Sargent Deposition, at 171-72.

Sometime during the afternoon of June 30, 1986, the apartment of Hope Collins was completely cleaned and gutted. Exhibit 11, Stechshulte Deposition, at 59, 97-102; Exhibit 14, Sargent Deposition, at 150-54; Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 791. At that time, Mr. Cryer had taken no samples from the apartment for testing by the OACL. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 789-94; *see* Exhibit 14, Sargent Deposition, at 151. Although all law enforcement officials questioned in connection with this case acknowledge that proper procedure requires collection of samples prior to release of the scene, and the maintaining of a proper chain of custody of evidence, Exhibit 11, Stechshulte Deposition, at 13-14, 105; Exhibit 14, Sargent Deposition, at 37-38, neither took place in this case. Instead, Mr. Cryer allowed the apartment to be cleaned on the day of the fire and any evidence to be removed. Exhibit 11, Stechshulte Deposition, at 97-99; Exhibit 12, Heffner Deposition, at 48. Deputy Stechschulte, although not questioned on this point at trial, recalls seeing a truck backed up to the apartment and workmen throwing debris from the balcony of the Collins' apartment, to be hauled to the county landfill. Exhibit 11, Stechshulte Deposition, at 97-99. He made no effort to prevent the removal of any materials from the apartment. Exhibit 11, Stechshulte Deposition, at 97-100. Stechschulte was, however, upset that the apartment had been cleaned prior to the taking of evidence. Exhibit 14, Sargent Deposition, at 151.

Mr. Cryer returned to Putnam County to continue his investigation on July 1, 1986. At, that time, he informed the county prosecutor's office, through Assistant Prosecutor Randall Basinger, that he believed the fire had been started by arson. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 785. Mr. Cryer had still taken no physical samples and had no laboratory results concerning the identification of ignitable liquids in the fire debris, but instead based his

conclusions merely upon his belief that certain burn patterns visible in the Collins apartment were conclusive evidence of the presence of ignitable liquids. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 760. Richey has now presented unrefuted scientific evidence to demonstrate that Cryer's conclusions were, and are today, based upon unsound scientific analysis.

B. Identification of Richey as the Prime Suspect

The investigation of who started the fire quickly centered on the Petitioner, Kenneth Richey. During the afternoon and evening of June 29, 1986, Richey, along with a large group of others, had passed the time drinking and partying on the steps outside the apartment of Hope Collins. Prior to that time, Richey and his girlfriend, Kandace Barchet, had ended their relationship so that Barchet could begin a new relationship with another man, Mike Nichols. Trial Testimony, Kandace Barchet, Petitioner's Checklist, Tab 3, at 289; Trial Testimony, Mike Nichols, Petitioner's Checklist, Tab 3, at 337-38. Although the prosecution maintained that Richey was in a jealous rage from this break-up, many witnesses testified that Richey was not bothered at all. Trial Testimony, Candy Barchet, Petitioner's Checklist, Tab 3, at 312; Trial Testimony, Hope Collins, Petitioner's Checklist, Tab 3, at 86. At that time, Richey's hand was broken and was therefore in a bandage. *See* Trial Testimony, Robert Dannenberger, Petitioner's Checklist, Tab 3, at 188-89.

The intensity of the focus on Richey was increased by two other "facts." First, some members of the group who had been drinking on June 29, including Peggy Price a.k.a. Peggy Villearreal, recalled Richey making a statement concerning the building burning that evening. Trial Testimony, Robert Dannenberger, Petitioner's Checklist, Tab 3, at 171-72; Trial Testimony, Peggy Price, Petitioner's Checklist, Tab 3, at 224-25; Trial Testimony, Shirley Baker, Petitioner's Checklist,

Tab 3, at 395-96. Ms. Price has since recanted this testimony. Affidavit of Peggy Villearreal, ¶¶ 19-20 (Exhibit 18 to the Petition). Second, upon his discovery of the fire, Richey attempted to enter the Collins apartment to save Cynthia. Although Richey unquestionably undertook such actions at grave risk to his own life, Trial Testimony, Assistant Fire Chief Don Hoyt, Petitioner's Checklist, Tab 3, at 878-81, his actions were interpreted as evidence of his guilt, Exhibit 11, Stechschulte Deposition, at 151-54.

The investigation also revealed the whereabouts of Hope Collins, Cynthia's mother, during the fire. A friend of Ms. Collins, Denny Smith, had arrived at the Old Farm Village Apartments at approximately 3:30 a.m. on June 30, 1986. Trial Testimony, Hope Collins, Petitioner's Checklist, Tab 3, at 95. Ms. Collins left with Mr. Smith. Trial Testimony, Hope Collins, Petitioner's Checklist, Tab 3, at 100. She testified at trial that she left Richey to babysit for Cynthia. Trial Testimony, Hope Collins, Petitioner's Checklist, Tab 3, at 96-98. However, despite this testimony, Ms. Collins pleaded guilty to involuntary manslaughter, a third degree felony, arising from the fire and death of her daughter. Exhibit 15, *State of Ohio v. Hope Collins*, Transcript, August 15, 1986, at 2-3. Such a charge is inconsistent with the conclusion that she obtained a babysitter before leaving. *See* Exhibit 11, Stechschulte Deposition, at 155-56. Richey denies that he was asked to babysit or that he would agree to babysit, considering his state of intoxication at the time. Exhibit 16, Taped Interview of Kenneth Richey, dated July 1, 1986, at 30-31.

During the fire, Richey had to be physically restrained to stop him from entering the burning apartment of Hope Collins in an attempt to save Cynthia. Trial Testimony, Don Hoyt, Petitioner's Checklist, Tab 3, at 879. After he was restrained, the Columbus Grove Police Chief, Tom Miller, took Richey to the police station and questioned him merely

as a witness. Trial Testimony, Tom Miller, Petitioner's Checklist, Tab 3, at 656. Later in the afternoon on June 30, 1986, Deputy Stechschulte questioned Richey concerning his whereabouts during the fire. Trial Testimony, Steve Stechschulte, Petitioner's Checklist, Tab 3, at 940-41. Although Deputy Stechschulte reported to the Ohio Department of Youth Services that Richey appeared intoxicated upon his arrival at the Richey apartment, Stechschulte still questioned Richey. Exhibit 11, Stechshulte Deposition, at 143-45. Richey denied any involvement in the fire and explained that he had returned to his father's apartment to go to sleep following the party. *See* Trial Testimony, Steve Stechschulte, Petitioner's Checklist, Tab 3, at 940, 954. The next afternoon, Assistant Prosecutor Basinger ordered Richey arrested for starting the fire at the Collins apartment. Exhibit 14, Sargent Deposition, at 145, 219. Deputy Stechschulte, accompanied by Deputy Roy Sargent, returned to the Richey apartment in Columbus Grove, Ohio, arrested Richey and took him to the Sheriff's Department in Ottawa, Ohio. Trial Testimony, Roy Sargent, Petitioner's Checklist, Tab 3, at 673-74. At the Sheriff's Department, Richey was questioned by Deputy Sargent, Assistant Fire Marshall Cryer and Assistant Prosecutor Basinger. Trial Testimony, Roy Sargent, Petitioner's Checklist, Tab 3, at 676-77. Throughout the interrogation, Richey maintained his innocence. Trial Testimony, Roy Sargent, Petitioner's Checklist, Tab 3, at 716.

C. The Evidence Concerning Arson

On July 1, 1986, the state acquired its first physical evidence in the case against Richey. First, the state took Richey's clothing and boots that he had been wearing on the night of June 29 and early morning of June 30 for physical testing to detect the presence of ignitable liquids. Later testing by the OACL revealed no traces of ignitable liquids on any of

these objects, including the soles of Richey's shoes and the bandage that was wrapped around his broken hand. Exhibit 17, Arson Crime Laboratory Report, dated July 10, 1986. The state also acquired its first physical evidence from the fire on July 1, 1986. Sometime during that day, investigators claim to have "discovered" that the apartment had been cleaned out by the owners of the Old Farm Village Apartments. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 791. Deputy Harry Berger, along with Deputy Dennis Cupp of the Putnam County Sheriff's Department, was sent to the county landfill to attempt to recover physical evidence from the apartment of Hope Collins, including the carpet from the living room of the apartment. Trial Testimony, Harry D. Berger, Petitioner's Checklist, Tab 3, at 641-47. Deputy Berger recovered a piece of carpeting, identified as that from Hope Collins apartment.[9] Exhibit 18, Supplementary Investigation Report Prepared by Harry D. Berger, dated July 2, 1986.

Given Mr. Cryer's conclusion that ignitable liquids had been used, another avenue pursued by the Sheriff's Department was to attempt to identify the source of those liquids. No empty containers from the alleged ignitable liquids were ever located. Exhibit 11, Stechschulte Deposition, at 146-47. The search later focused on a greenhouse across the street from the Old Farm Village Apartments, the K & J Greenhouse. The door to this greenhouse was unlocked and a storeroom contained gasoline and paint thinner. Trial Testimony, Kenneth Wright,

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[9] At trial, Richey's defense counsel, William Kluge, asked only limited questions concerning the recovery effort, Berger's instructions and the other debris from the apartment. *See* Trial Testimony, Harry D. Berger, Petitioner's Checklist, Tab 3, at 645-49. Furthermore, Kluge asked no questions about the handling of the carpet following its retrieval.

Petitioner's Checklist, Tab 3, at 620. Richey had taken some plants from the greenhouse earlier in the evening. *See* Trial Testimony, Kenneth Wright, Petitioner's Checklist, Tab 3, at 617-19. Although during trial the prosecution focused on this greenhouse as the source of the ignitable liquids used to start the fire, the owner of the greenhouse, Kenneth Wright, could not determine whether any gasoline or paint thinner was missing. Trial Testimony, Kenneth Wright, Petitioner's Checklist, Tab 3, at 620-21; Exhibit 11, Stechschulte Deposition, at 133. Moreover, Deputy Stechschulte testified in his deposition that his investigation did not reveal the source of the ignitable liquids. Exhibit 11, Stechshulte Deposition, at 146-47. Finally, no sample was ever taken from the greenhouse for testing and comparison by the Ohio Arson Crime Laboratory, as recommended by the Fire Marshal's manual when a source of ignitable liquids is potentially identified. Exhibit 19, Ohio Arson Crime Laboratory, "Collection, Preservation, and Submission of Physical Evidence of a Suspected Arson or Bombing," at 8, December 1983 ("OACL 1983 Manual").

The investigation by the Putnam County Sheriff's Department also revealed two other important facts. The first concerned the penchant of Cynthia Collins for playing with fire. Peggy Villearreal, a neighbor of Hope Collins, told the investigators and defense counsel of Cynthia's history of playing with matches and the fact that Cynthia had started at least one fire. Affidavit of Peggy Villearreal, ¶¶ 9-13 (Exhibit 18 to the Petition). Discovery during this federal action has confirmed these underlying facts. *See, e.g.*, Exhibit 1, Collins Deposition, at 78-80.

The investigation also revealed two pieces of information about the smoke detectors in Hope Collins' apartment and the apartment complex. First, Peggy Villearreal told the investigators that Hope Collins had disconnected her smoke

detector on the night of the fire.[10] Exhibit 14, Sargent Deposition, at 194-95, 207-08. The smoke detectors in the Old Farm Village Apartments were sensitive and would often be set off by cooking. Exhibit 1, Collins Deposition, at 39-41. Hope would therefore disconnect the smoke detector when she cooked, as she did with Peggy Villearreal during the evening of June 29, 1986. Exhibit 1, Collins Deposition, at 39-42, 44-45, 57-58. The investigation further revealed that residents of the Old Farm Village Apartments generally disconnected their smoke detectors because of their sensitivity. Exhibit 11, Stechschulte Deposition, at 138-39; Exhibit 20, Steven Stechschulte's Handwritten Notes. None of these facts, although exculpatory and material, were revealed by prosecutors to the defense. Exhibit 21, Affidavit of William F. Kluge, Esq. ("Kluge Affidavit"), ¶¶ 4-7; Exhibit 22, Affidavit of Gregory W. Donohue, Esq. ("Donohue Affidavit"), ¶¶ 4-6.

The investigation continued. On July 10, 1986, despite acquiring no further evidence concerning Richey, a Putnam County Grand Jury indicted Richey for aggravated murder, aggravated arson, breaking and entering, involuntary manslaughter, and child endangerment. Indictment, Petitioner's Checklist, Tab 18. Although Richey has repeatedly sought discovery of the testimony of witnesses at

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[10] In her affidavit filed with Richey's Habeas Petition, Ms. Villearreal relates her belief that she also informed defense counsel of this point. *See* Affidavit of Peggy Villearreal, ¶¶ 14-18 (Exhibit 18 to the Petition). The State now appears to concede this point, *see* Exhibit 23, Respondent's Motion for Ruling Under R.C. §2953.23(A) or for Ruling Under R.C. §2953.21(C) and/or for Summary Judgment Under R.C. §2953.21(D), at 9-10, although they questioned defense counsel extensively on this issue during depositions. Exhibit 21, Kluge Deposition, at 25-26; Exhibit 24, Donohue Deposition, at 13-16.

the grand jury, it has been revealed that, despite the requirements of Ohio law, no transcript was taken of the grand jury testimony. At Richey's arraignment, Gregory Donohue was appointed as Richey's counsel. Exhibit 24, Gregory W. Donohue Deposition, June 4, 1999 ("Donohue Deposition"), at 6-7. Given the magnitude of the charges, Donohue requested that William Kluge be appointed as co-counsel. This was later accomplished, and Mr. Kluge took over the role as lead counsel. Exhibit 24, Donohue Deposition, at 6-7.

Following Richey's indictment, the Assistant Fire Marshall Cryer acquired other physical samples for testing by the OACL. These samples included (1) carpeting; (2) wood from the deck of the Collins apartment; and (3) concrete from the living room floor of the Collins apartment. *See* Exhibit 25, Arson Crime Laboratory Report, dated July 28, 1986. At trial, defense counsel asked only limited questions concerning the acquisition of these samples. Discovery in this action, however, has revealed the following facts about the sampling accomplished by Mr. Cryer. The samples from the carpet were not taken until after recovery of the carpet from the county landfill. Exhibit 14, Sargent Deposition, at 173-76,178-80; Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 765. Moreover, sometime after recovery of the carpet, and before the sampling, the carpet was laid out in the parking lot behind the Sheriff's Department in Ottawa. Exhibit 14, Sargent Deposition, at 178-80. As can be seen in photographs and a diagram drawn by the members of the Sheriff's Department, the carpet was laid out near the gasoline pumping station used by the Sheriff's Department to refuel their cruisers. Exhibit 26, Photograph of Carpet in the Parking Lot of the Sheriff's Department; Exhibit 27, Diagram of Parking Lot of Sheriff's Department Prepared By Roy Sargent. During trial, Richey's counsel did not question the state's witnesses about the sampling of the carpet. During discovery in this action, Richey's counsel pursued this area. It

appears that the samples were taken from the carpet by Mr. Cryer while it was laid out in the Sheriff's Department parking lot a significant period of time (two to three weeks) following the fire. *See* Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 765-66, 790. Three samples were taken from the carpet. *See* Exhibit 25, Arson Crime Laboratory Report, dated July 28, 1986. During his deposition, Mr. Gelfius testified that the OACL was not told of the history of the carpet prior to testing. Exhibit 28, Gelfius Deposition, vol. I, June 8, 1999, at 74-75. Even if the OACL been so informed, it is unlikely that the OACL would have conducted any testing based upon concerns about the reliability of the evidence. Exhibit 28, Gelfius Deposition, vol. I, June 8, 1999, at 75-78.

The other samples, from the wood deck outside the Collins apartment and from the living room floor, were apparently taken some two and a half weeks after the fire. Although Mr. Cryer has testified that he reached an initial conclusion concerning the cause of the fire on June 30, 1986 and a more definite conclusion on July 1, 1986, sufficient to allow for the arrest of Richey on charges of arson, Mr. Cryer took no physical samples from the apartment for another two and a half weeks. Trial Testimony, Robert Cryer, Petitioner's Checklist, Tab 3, at 793-94. At that time, he took two samples from the deck and one from the concrete of the living room floor. Between the time of the fire and the time of this sampling, the Collins apartment was not secured. Exhibit 14, Sargent Deposition, at 150-54; Exhibit 11, Stechschulte Deposition, at 59, 97-101. Richey's current investigation has revealed that some work had been done on the deck prior to the sampling, including, at least, the removal of the railing. Exhibit 29, Photograph of deck with railing removed; Exhibit 14, Sargent Deposition, at 189-90 (noting that the Sheriff's Department did not remove the railings). This work was not done by members of law enforcement. Exhibit 14, Sargent

Deposition, at 189-90. Mr. Cryer, in violation of the policy manual issued by the State Fire Marshal's Office, did not take control samples of the deck or concrete floor. Exhibit 19, OACL 1983 Manual, at 11; Exhibit 25, Arson Crime Laboratory Report, dated July 28, 1986.

Mr. Cryer delivered these six samples (three pieces of carpet, two wood chips and one concrete chip) to the OACL for testing. The OACL declared that three of the samples were positive for ignitable liquids. Exhibit 25, Arson Crime Laboratory Report, dated July 28, 1986. According to Dan Gelfius, an OACL technician, one carpet sample contained gasoline; another carpet sample contained paint thinner, and one sample of wood from the deck contained paint thinner. *Id.* Mohamed Gohar, the Chief of the OACL, concurred in these conclusions. *Id.* The three other samples, a piece of wood from the deck, the concrete floor chip and a piece of carpet were identified as negative for ignitable liquids. *Id.* The negative carpet sample was identified as a "control sample" and further testing revealed that the carpet was not flame resistant. *Id.* In fact, after ignition and removal of the ignition source, the carpet continued to burn. *Id.*

The state also had the electrical evidence from Hope Collins' apartment investigated by System Engineering Associates of Columbus, Ohio. Randall Bills, an engineer from SEA, did not personally visit the apartment, but he did inspect both the electric fan, initially identified by Fire Chief Heffner as the cause of the fire, and the smoke detector after their removal from the apartment. Trial Testimony, Randall Bills, Petitioner's Checklist, Tab 3, at 859. He concluded that neither were the cause of the fire. Trial Testimony, Randall Bills, Petitioner's Checklist, Tab 3, at 864, 868. He also concluded that, due to the extreme damage to and melting of the smoke detector, he could not determine whether the smoke detector had operated during the fire. Trial Testimony,

Randall Bills, Petitioner's Checklist, Tab 3, at 864. Photographs of the smoke detector reveal the extreme damage it sustained from the fire. Exhibit 30, Photographs of the melted smoke detector.

Thus, by the end of July, the state had acquired the following evidence that the fire in Hope Collins' apartment had been caused by arson: first, Assistant State Fire Marshal Cryer identified certain characteristics of accelerated fires from his inspection of the apartment; second, the OACL identified ignitable liquids in three samples recovered during the investigation of the fire; and third, SEA eliminated the fan as a cause of the fire.

The prosecution had also acquired the following evidence concerning Richey as the possible arsonist. Richey, according to some witnesses, had threatened to burn the building containing the Collins apartment. Further, Richey, according to Hope Collins, had been babysitting for Cynthia at the time of the fire. Richey, along with everyone else, had access to the unlocked Collins apartment. Finally, and the coup de grace for the prosecution, Richey's former girlfriend, Ms. Barchet, was in the apartment below the Collins' apartment with her new boyfriend, Mike Nichols. Throughout this case it has been the prosecution's contention that this fact supplied the critical motive for the crime — Richey passed by the open window to Ms. Barchet's bedroom and then set the fire in the upstairs apartment in an attempt to kill his ex-girlfriend in the apartment below. *See* Closing Argument of the Prosecution, Petitioner's Checklist, Tab 5, at 1006.[11]

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[11] The prosecution has never maintained that Richey intended to kill Cynthia, but rather that his intent to kill Ms. Barchet and Nichols was transferred to Cynthia. *See* Bill of Particulars (Exhibit 9 to the Petition); *see also* Transcript of Argument Before Ohio Supreme Court (Exhibit 3 to the Petition, at 16); Closing Argument of the Prosecution, Petitioner's Checklist, Tab 5, at 1025-26.

D. Actions of Defense Counsel

It was this evidence that Kluge and Donohue, Richey's trial counsel, were charged with rebutting. In an attempt to respond to the state's evidence concerning the cause of the fire and the identification of ignitable liquids in the fire debris, Kluge retained L. Gregory DuBois of CTL Engineering in Columbus, Ohio. For Richey, this was perhaps a fatal mistake. DuBois, according to the resume he provided to Kluge, had very limited training in fire investigation. Exhibit 31, Letter from L. Gregory DuBois to William Kluge, dated September 11, 1986, attaching the Resume of L. Gregory DuBois and a Fee Schedule ("DuBois Resume").[12] DuBois had taken two courses in fire investigation, one in 1983 and the other in 1984. Exhibit 10, DuBois Deposition, at 21-33; 41. Each course had been only two days. Exhibit 10, DuBois Deposition, at 23-24, 32-33. DuBois's formal training is in Metallurgical Engineering. Exhibit 10, DuBois Deposition, at 7-8. Even worse from the point of view of a reasonable defense attorney, the two formal training courses DuBois had taken were taught by members of the State Fire Marshal's Office. Exhibit 31, DuBois Resume; Exhibit 10, DuBois Deposition, at 23, 32-33. The first course, which included DuBois's only formal training in the analysis of gas chromatograph data, was taught by Mohamed Gohar, the head of the OACL. Exhibit 10, DuBois Deposition, at 23. Thus,

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[12] During his deposition in this federal action taken by counsel for the Respondent, Kluge indicated that he located DuBois from a flyer he received in the mail. Exhibit 32 , Kluge Deposition, at 11-12. DuBois, on the other hand, believes Kluge told him that he had been recommended by someone in the law enforcement community. Exhibit 10, DuBois Deposition, at 64. DuBois's file contains a letter to Mr. Ron Straker of the Lima Fire Department, thanking him for the recommendation. Exhibit 33, Letter from L. Gregory DuBois to Ron Straker, dated September 16, 1986.

although Kluge hired DuBois to critique and question the methodologies of the OACL and the State Fire Marshal's Office, DuBois had no basis for doing so because he had learned all he knew about fire investigation from the OACL itself! Despite the limited training, and the source of that training, as listed on DuBois's resume, Kluge never questioned DuBois concerning these issues. See Exhibit 31, DuBois Resume; Exhibit 32, Kluge Deposition, at 13-14.

Furthermore, Kluge failed to provide DuBois with all of the relevant information necessary for DuBois to reach a conclusion. Kluge told DuBois, despite no indication from the court, that the budget in the case was very limited and that DuBois could only spend ten hours on the case.[13] Exhibit 10, DuBois Deposition, at 59-64, 67. DuBois, therefore, did not conduct as extensive an investigation as he otherwise might have. Exhibit 10, DuBois Deposition, at 12627, 180-81. Although both Kluge and DuBois, as well as Richey's current experts Dr. Andrew Armstrong and Harry Reinhardt, acknowledge that the general and proper procedure in a case such as this would be for the defense expert to retest any physical samples to confirm the OACL's conclusions, no such testing was conducted. Exhibit 10, DuBois Deposition, at 54-56; Exhibit 32, Kluge Deposition, at 23; Armstrong Affidavit, ¶21(b) (Exhibit 2 to the Petition); Supplemental Affidavit of Harry Reinhardt, ¶ 4 (Exhibit 7 to the Petition). Instead, DuBois merely traveled to the OACL in Reynoldsburg, Ohio to review their conclusions. Exhibit 10, DuBois Deposition, at 101-102. At that meeting, the head of the OACL, Mr. Gohar, as well as the technician who performed the testing of the Richey samples, Dan Gelfius, reviewed the OACL's

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[13] Richey was indigent and therefore required appointment by the court of any experts. Kluge moved for the appointment of DuBois specifically, which the court approved. *See* Exhibit 11 to Respondent's Return of Writ.

conclusions with DuBois. Exhibit 10, DuBois Deposition, at 101-102. In particular, they reviewed the gas chromatographs produced from the analysis of the samples the OACL had identified as positive for ignitable liquids. By the end of the meeting, DuBois had been convinced that the OACL was correct. Exhibit 10, DuBois Deposition, at 109-10. Moreover, Mr. Gohar, whom DuBois greatly respected, Exhibit 10, DuBois Deposition, at 31-32, 37, chided DuBois for working for the defense, Exhibit 10, DuBois Deposition, at 116-17. In fact, despite being retained by the defense, DuBois so respected the OACL that he deferred to their judgment. Exhibit 10, DuBois Deposition, at 118-19, 124-25. In his deposition as part of Richey's federal habeas action, DuBois admitted that he did not believe he was qualified to question the OACL. Exhibit 10, DuBois Deposition, at 118-19, 124-25. Kluge, however, was aware of nothing but DuBois's ultimate conclusion, as his conversations with DuBois were extremely limited.

Kluge also failed to inform DuBois of all relevant facts concerning the history of the physical samples in the case. Although Kluge told DuBois of some concerns with the control of the carpet, DuBois testified at his deposition that he was not informed of the complete factual history of the carpet, including the placement of the carpet in the parking lot of the Sheriff's Department. Exhibit 10, DuBois Deposition, at 98-100. When given this information, DuBois could not determine whether it would have changed his conclusions in the case. Exhibit 10, DuBois Deposition, at 173-74.

This is especially important in light of DuBois's scientific conclusions. Although he testified at trial that he agreed with all of the prosecution's conclusions, his deposition casts some doubt on this conclusion. Although DuBois testified that he did agree with the conclusion concerning the identification of gasoline, he was less sure concerning the two samples identified as positive for paint

thinner. Exhibit 10, DuBois Deposition, at 119. If he had been given the history of the carpet, which effectively explained the presence of gasoline in the sample, DuBois might have focused more carefully on the other conclusions reached by the OACL. Instead, after his meeting with the OACL, DuBois told Kluge that his conclusions would not help Richey and thus he did not feel he should testify. Exhibit 10, DuBois Deposition, at 125-27. Kluge simply acquiesced without pushing DuBois for details concerning his investigation. Exhibit 10, DuBois Deposition, at 125-26. In fact, Kluge met only briefly with DuBois and never received a written report. See Kluge Deposition at 17-18.[14]

The involvement of DuBois in the Richey case did not end there, however. On December 12, 1986, prior to receiving any report or conclusions from DuBois, Kluge listed DuBois as a witness he intended to call at trial. Exhibit 32, Kluge Deposition, at 16-17; Exhibit 31 to Respondent's Return of Writ. After receiving the oral report from DuBois, however, Kluge determined he would not call DuBois. Exhibit 32, Kluge Deposition, at 20-21. He then notified the prosecution of this decision. Exhibit 10, DuBois Deposition, at 135. The prosecution, clearly able to read the handwriting on the wall concerning DuBois, subpoenaed him to testify at trial. Exhibit 10, DuBois Deposition, at 134-35. Although DuBois contacted Kluge and requested his assistance in resisting the subpoena, Kluge took no action. Exhibit 10, DuBois Deposition, at 134-36. Thus, DuBois, the expert initially retained by Richey, was forced to testify at trial in favor of the prosecution. Kluge did not cross-examine DuBois, but rather,

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[14] At his deposition, Kluge testified that he believed DuBois had run independent tests to confirm the OACL's conclusion. Exhibit 32, Kluge Deposition, at 23. Thus, it is clear that Kluge had extremely limited contact with his expert.

despite believing DuBois had nothing helpful to say for the defense, reserved the right to call DuBois as a defense witness. Trial Transcript, Petitioner's Checklist, Tab 3, at 822.

Upon receipt of the oral report by DuBois, Kluge conducted no further investigation into the scientific evidence in the case. Kluge did not meet with DuBois to identify any mistakes in the procedures utilized by the state. Moreover, he did not meet with DuBois to learn sufficient facts concerning the investigation of the cause of fires and the identification of ignitable liquids in fire debris to allow for competent cross-examination of the state's witnesses on these points. Kluge did not press DuBois for the basis of his conclusions or whether he questioned any conclusions of the state. Exhibit 10, DuBois Deposition, at 136-37. Rather, from that point on, Kluge assumed, despite his wholly inadequate investigation, that he could not rebut the state's evidence of arson. Exhibit 32, Kluge Deposition, at 20-21. His focus turned, instead, to putting the State to its proof about the identification of Richey as the arsonist.[15] Exhibit 32, Kluge Deposition, at 20-21.

E. The Trial

At trial Kluge failed to present any scientific evidence concerning the cause of the fire. Further, Kluge failed to effectively cross-examine the state's witnesses on this point. Despite convincing Richey to waive a jury trial given the emotional nature of the case, Kluge failed to present evidence of Cynthia Collins' history of playing with fire. Finally, Kluge

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[15] That Kluge's "strategy" was merely to put the State to its proof is demonstrated by the extremely limited defense Kluge presented at the guilt phase of the trial. Kluge called only two witnesses, the manager of the Old Farm Village Apartments and Tom Miller, the Chief of Police of Columbus Grove, who had already testified for the State. *See* Trial Transcript, Petitioner's Checklist, Tab 4, at 975-1002 (entire defense case, including cross-examination by the state).

failed to focus upon and question any evidence concerning the smoke detector at Hope Collins' apartment. Even if such a failure were arguably "strategic" during the guilt phase of the trial, there is simply no justification for failing to raise this question at the penalty phase, after Richey stood convicted.

On January 8, 1987, Richey was convicted of aggravated murder, aggravated arson, breaking and entering, and child endangerment by a three-judge panel in the Putnam County Court of Common Pleas in Ottawa, Ohio. After a sentencing hearing, that panel sentenced Richey to death on January 26, 1987. The three judge panel explicitly relied upon their belief that Richey had disconnected the smoke detector to determine that the aggravating circumstances outweighed any mitigating circumstances. Opinion of the Trial Judge in a Capital Case, February 9, 1987 (Exhibit 15 to the Petition); *id.*, Petitioner's Checklist, Tab 17, at 2.

F. The Direct Appeal

Kluge and Donohue did not handle the direct appeal. Instead, they handed the case off to the Capital Crimes section of the Ohio Public Defenders Office. In 1987, that office was headed by David Stebbins. Exhibit 34, Murray Deposition, at 10. Mr. Stebbins assigned Ken Murray, with the assistance of Jane Perry, to the Richey case. Exhibit 34, Murray Deposition, at 11, 13-14. Mr. Murray and Ms. Perry both acknowledge that they failed to provide effective assistance to Richey in his direct appeal. Affidavit of Ken Murray ("Murray Affidavit"), ¶¶ 11 -15 (Exhibit 19 to the Petition); Affidavit of Jane Perry ("Perry Affidavit"), ¶¶ 5-9, Petitioner's Checklist, Tab 33, Attachment D. They acknowledge that they simply failed to address important legal issues and that the failure was not based upon a strategic decision. Murray Affidavit, ¶¶ 11-15 (Exhibit 19 to the Petition); Perry Affidavit, ¶¶ 5-9, Petitioner's Checklist, Tab 33, Attachment D.

Mr. Stebbins also instructed Mr. Murray not to raise ineffective assistance of counsel arguments on direct appeal due to his friendship with Mr. Kluge, Exhibit 34, Murray Deposition, at 50-51; Murray Affidavit ¶¶ 5-8 (Exhibit 19 to the Petition); *see also* Exhibit 35, Stebbins Deposition, at 64-65. Stebbins and Kluge had become friendly as members of the criminal defense bar in Ohio. Exhibit 32, Kluge Deposition, at 26; Exhibit 35, Stebbins Deposition, at 37-39. At least partially on this basis, Stebbins held a closed door meeting with Murray and instructed him not to raise ineffective assistance of counsel arguments on direct appeal. Exhibit 34, Murray Deposition, at 17-23, 26-27, 50-51; *see* Exhibit 35, Stebbins Deposition, at 64-65. Although Murray testified that he snuck back into the office late one night to add an ineffective assistance of counsel claim to the direct appeal brief, the argument left out important aspects of Kluge's ineffective assistance and presented the claims in a generally weak fashion. Murray Affidavit, ¶ 8 (Exhibit 19 to the Petition); Exhibit 34, Murray Deposition, at 17, 34-35, 41-42.

The Ohio Court of Appeals affirmed the conviction and death sentence of Richey. The Ohio Supreme Court similarly affirmed, in a four to three decision. The United States Supreme Court denied certiorari on March 22, 1993.

III. At Least, the Court Should Exercise its Discretion and Hold an Evidentiary Hearing

This Court should exercise its discretion to hold an evidentiary hearing if it determines that such a hearing is not mandatory. As the Supreme Court has noted, even if an evidentiary hearing is not mandatory, the District Court maintains the discretion to hold such a hearing.

> The purpose of the test is to indicate situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material

> facts are in dispute, the holding of such a hearing is in the discretion of the district judge.

Townsend, 372 U.S. at 318. An evidentiary hearing is especially appropriate when a habeas petition presents the claims of an individual subject to execution. "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995). Given the factual record in this case, as described above, this court should exercise its discretion and allow Petitioner to present testimonial evidence during an evidentiary hearing.

IV. Although the Respondent May Argue to the Contrary, 28 U.S.C. § 2254(e)(2) Does Not Prohibit an Evidentiary Hearing in this Case.

The Amended Effective Death Penalty Act ("AEDPA") does not prohibit an evidentiary hearing in this case. Richey filed the instant Petition after the adoption of the AEDPA on April 24, 1996. Respondent may argue that, under the terms of that statute, Richey is not entitled to an evidentiary hearing in this case. Following the adoption of the AEDPA, federal law now provides:

> If the applicant has *failed to develop the factual basis of a claim in State court proceedings*, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —
>
> (A) the claim relies on —
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (emphasis added). Because Richey sought to develop and present his evidence in an evidentiary hearing before the state courts, 28 U.S.C. § 2254(e)(2) does not apply to this case.

A. 28 U.S.C. § 2254(e)(2) Does Not Bar Richey's Evidentiary Hearing Because Richey Sought to Develop and Present These Facts Before the State Courts.

Every Court of Appeals to address the scope of § 2254(e)(2) has concluded that it does not prohibit an evidentiary hearing if the Petitioner sought an evidentiary hearing in state court but was denied. As Richey unquestionably sought such a hearing, § 2254(e)(2) does not prohibit this Court from granting the instant motion.

Richey sought to develop the factual basis for his claims in his state court post-conviction proceedings. In his Petition to Vacate or Set Aside Sentence: O.R.C. Section 2953.21, Richey explicitly sought discovery and an evidentiary hearing before the Ohio state courts. *See* Petitioner's Checklist, Tab 40, at 6 ("The risk of such a gross miscarriage of justice in violation of Richey's constitutional rights, particularly in a death penalty case, should compel this Court to grant Richey discovery, evidentiary hearing, and a new trial."); *see also id.* at 52 (requesting evidentiary hearing in demand for relief). In response to this petition in state court, the state filed a Motion for Ruling Under R.C. 2953.21(C) and/or Motion for Summary Judgment under R.C. 2953.21(D). Petitioner's

Checklist, Tab 41. In opposition, Richey continued to insist upon his right to an evidentiary hearing before the state court. *See* Kenneth T. Richey's Memorandum In Opposition to the State's Motion for Ruling Under R.C. 2953.21(C) and/or Motion for Summary Judgment Under R.C. 2953.21(D), Petitioner's Checklist, Tab 42, at 2 ("Because that evidence, if true, would establish both Richey's actual innocence, and, as will be seen, that he received ineffective assistance of counsel, there must be an evidentiary hearing to evaluate the substantive claims raised by the Petition."). The Court of Common Pleas, Putnam County, Ohio, denied Richey's Petition to Vacate without an evidentiary hearing. *See* Findings of Fact, Conclusions of Law, Entry Denying Petition to Vacate or Set Aside Sentence Without a Hearing, Petitioner's Checklist, Tab 43.

The Respondent may not rely upon § 2254(e)(2) because Richey's failure to develop any facts in state court was through no fault of his own. The Fourth Circuit's decision in *Cardwell v. Greene*, 152 F.3d 331 (4th Cir.), *cert. denied*, __U.S.__, 119 S. Ct. 587 (1998), is representative of decisions limiting the scope of § 2254(e)(2). *See also Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998); *Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997); *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997); *Love v. Morton*, 112 F.3d 131, 136 (3d Cir. 1997). *Cardwell* explains that, while *Townsend*, 372 U.S. 293, as modified by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), still sets forth the operatives standard for determining whether a habeas petitioner is entitled to an evidentiary hearing, § 2254(e)(2) creates an "initial hurdle" that a petitioner must overcome.

> The petitioner who seeks an evidentiary hearing in federal court must now clear the "initial hurdle" of § 2254(e)(2), . . . before the court can proceed to

> determine whether an evidentiary hearing is otherwise proper or necessary. Thus, a federal court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has "failed to develop the factual basis of a claim in State court."

Cardwell, 152 F.3d at 336-37 (citation omitted). In *Cardwell*, certain facts in support of the petition had not been developed in state court. *Id.* at 337. The Fourth Circuit noted, however, that this was due not to Cardwell's failure to attempt to develop the facts, but rather to the denial of Cardwell's request for an evidentiary hearing in state court. *Id.* The Fourth Circuit therefore confronted the question of whether Cardwell "failed" to develop the facts in support of his petition under these circumstances. The court concluded:

> We join four of our sister circuits in holding that where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, § 2254(e)(2) will not preclude an evidentiary hearing in federal court.

Id. (joining the Third, Fifth, Seventh, and Ninth Circuits). Thus, § 2254(e)(2) does not prevent this court from granting Richey's motion.

Section 2254(e)(2) was designed to prevent a petitioner from attempting to circumvent state court review of his claims by not fully presenting claims to the state courts. "In the interest of comity, § 2254(e)(2) forbids the federal court to grant an evidentiary hearing to a petitioner who has deprived the state courts of a meaningful opportunity to rule on a federal claim." *Id.* at 337-38. However, if the failure to develop facts is due to an action by the State or the courts, then § 2254(e)(2) does not prohibit a federal evidentiary hearing.

> We conclude that there is a material distinction... between a petitioner's failure to seek or to seize an opportunity to present evidence, and an inability to persuade a state court that an evidentiary hearing is required. The lack of factual development in the second instance results not from an omission by the petitioner, but from the state court's determination that an evidentiary hearing is unnecessary.

Id. at 338. As described above, Richey sought an evidentiary hearing before the Ohio courts to present and develop the facts at issue in his federal Petition for a Writ of Habeas Corpus. Any lack of factual development stems from the failure of the state court to grant such a hearing, and not from any failure on the part of Richey. Under these circumstances, § 2254(e)(2) does not prohibit a federal evidentiary hearing.

Conclusion

For the foregoing reasons, Petitioner's Motion for Evidentiary Hearing should be allowed.

Respectfully submitted,

KENNETH T. RICHEY

By his attorneys,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH T. RICHEY,	:	
Petitioner,	:	Case Number: 1:98 CV 1418
v.	:	Civil Action
BETTY MITCHELL, Warden,	:	JUDGE GAUGHAN
Respondent.	:	

Respondent's Memorandum in Response to Richey's Motion for an Evidentiary Hearing

Richey has filed a motion for an evidentiary hearing, but he has not demonstrated that he is entitled to one under the governing rules. A memorandum in response follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

As the State has maintained since Richey first presented his "newly-discovered" evidence, this case is about belated expert shopping, not actual innocence. Richey has located experts willing to contest the scientific proof of arson admitted at Richey's trial. And Richey faults his trial counsel for not "shopping around" for new experts after their own expert agreed with the State's experts.

To ensure that Richey had every opportunity to develop the facts in support of his claims, we did not oppose Richey's discovery requests concerning actual innocence and ineffective assistance of trial counsel. Indeed, we requested additional discovery (in the form of nonprivileged documents from Richey and his agents as well as depositions) to make sure that all facts concerning these claims would be unearthed. Having finished the discovery process, we find that there is no evidence of actual innocence or ineffective assistance of trial counsel even if Richey's proposed facts are true, as Richey leaves virtually untouched the State's circumstantial evidence as well as direct evidence of admissions that prove his guilt irrespective of the scientific evidence. Richey is therefore not entitled to an evidentiary hearing.

II. RICHEY FAILS TO DEMONSTRATE THAT HE IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS ACTUAL INNOCENCE CLAIMS.

A. Standards Governing Actual Innocence Claims

Richey has raised both a "free-standing" actual innocence claim as well as a "gateway" actual innocence claim. Both claims fail and a hearing is unnecessary even if Richey could prove everything he says he could prove.

(1) *There is no such thing as a "free-standing" actual innocence claim, and even if there is, Richey fails even to allege the existence of evidence that unquestionably proves his innocence.*

Richey first claims entitlement to a hearing on his "free-standing" claim of actual innocence. That is, Richey wants an opportunity to retry his case and demonstrate his actual innocence without concomitantly demonstrating an attendant constitutional violation. Richey relies upon Herrera v. Collins, 506 U.S. 390 (1993). But the circuit courts disagree whether Herrera established the propriety of such a claim. Several courts have read Herrera as disallowing such free-standing claims in habeas. Creel v. Johnson, 162 F.3d 385, 395 (5th Cir. 1998); Sellers v. Ward, 135 F.3d 1333, 1338-1339 (10th Cir. 1998); Guinan v. United States, 6 F.3d 468, 470 (7th Cir. 1993); Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996). Other courts have read Herrera in the opposite way or at least assumed for the sake of argument that habeas courts could consider free-standing claims of actual innocence. Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc) (holding that "free-standing" actual innocence is a proper claim but not finding sufficient evidence of it); Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997); O'Dell v. Netherland, 95 F.3d 1214, 1246 n.25 (4th Cir. 1996) (assuming for the sake of argument that "free-standing" actual innocence states a claim, but noting that the Herrera opinion at 506 U.S. at 416-17 seems to dictate otherwise).

For purposes of this memorandum, we will assume for the sake of argument that a petitioner may raise a "free-standing" claim of actual innocence. The Supreme Court's discussion of the issue indicates that a petitioner must convince the court "that those new facts unquestionably establish [the petitioner's] innocence." Schlup v. Delo, 513 U.S. 298, 316-317 (1995). Richey has not uncovered any such facts, and does not even suggest that he has done so.

(2) *Richey fails to prove that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."*

Unlike "free-standing" claims of innocence, "gateway" claims used to avoid procedural defaults involve a well-defined standard.[1] Schlup v. Delo, 513 U.S. 298 (1995). The Supreme Court requires the petitioner to demonstrate not merely a reasonable doubt in light of new evidence, but rather that "it is more likely than not that no reasonable juror would have convicted [the petitioner] in light of the new evidence." Id. at 327. It is not what this Court thinks, but the Court's "probabilistic determination" about what reasonable, properly instructed jurors would do. Id. at 329. The reviewing standard is an objective one. Calderon v. Thompson, __U.S.__, 118 S.Ct. 1489, 1502 (1998). Stated another way, the petitioner fails to meet his burden if "at least one juror, acting reasonably and properly instructed would have found" him guilty. Fairchild v. Norris, 51 F.3d 129, 130-131 (8th Cir.), cert. denied, 515 U.S. 1182 (1995); Schlup v. Delo, 513 U.S. at 329.

(3) *The record is sufficient to evaluate the actual innocence claims without a hearing.*

Richey cannot prove that he is unquestionably innocent, much less probably innocent. The Court has ample facts

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[1] We also note that Richey's claimed need to demonstrate "gateway" actual innocence is premature. The Court will need to reach this inquiry only if it finds that a ground for relief is procedurally defaulted and that Richey cannot demonstrate cause and prejudice for the default. Schlup v. Delo, 513 U.S. at 314-315. Respondent has not yet even asserted a procedural default defense. Moreover, it only makes sense to conduct this inquiry if the Court determines that an otherwise procedurally defaulted claim will result in relief.

before it that point to that conclusion, and thus a hearing is not required. McDonald v. Johnson, 139 F.3d 1056, 1060 (5th Cir. 1998); Cardwell v. Greene, 152 F.3d 331, 338-39 (4th Cir.) ("Cardwell has failed to forecast any evidence beyond that already contained in the record, or otherwise to explain how this claim would be advanced by an evidentiary hearing. The district court has already expanded the record to permit the inclusion of the reports.... We have long held that the need for an evidentiary hearing may be obviated by such expansion of the record; he has failed to demonstrate that any explication or clarification of the short and straightforward reports is required"), cert. denied, 525 U.S. 1037 (1998).

Indeed, the discovery process in this case represents an alternative to conducting an evidentiary hearing since that process led to full development of the facts concerning Richey's claims. The Supreme Court held that discovery and expansion of the record could be sufficient remedies to construct a record upon which the district court can decide a claim. Blackledge v. Allison, 431 U.S. 63, 81-82 (1977) (holding that a circuit court's remand for an evidentiary hearing was not necessary to decide a petitioner's claim that his plea was based on an unfulfilled promise from the prosecutor. The Court noted that Habeas Rules 6 and 7 could provide the necessary record for resolution of the claim).[2]

Since Richey cannot demonstrate his innocence even if his claims proved to be true, a hearing is not required. Kavanaugh v. Berge, 73 F.3d 733, 737 (7th Cir. 1996) (affirming denial of evidentiary hearing where petitioner was not allowed to call affiants at state court hearing, holding that

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[2] Respondent will be filing the original deposition transcripts in its possession pursuant to Habeas Rule 7.

"[t]he in-person testimony of the affiants was unnecessary; the affidavits represented the most favorable version of Kavanaugh's arguments. If he could not win based on the affidavits, live testimony would not have helped"); Ruiz v. Norris, 71 F.3d 1404, 1406 (8th Cir. 1995), cert. denied, 519 U.S. 963 (1996).

B. The State produced compelling circumstantial and direct evidence of Richey's guilt, all of which are still entitled to a presumption of correctness.

There is an important concept that is conspicuous by its absence from Richey's motion: presumption of correctness. 28 U.S.C. §2254(e)(1). Richey fails to discuss this concept because he views this case as a retrial in which the slate is wiped clean and this Court gets to decide the facts anew. Of course, federal habeas does not provide a forum for the retrial of a convicted felon. Herrera v. Collins, 506 U.S. at 401.

Federal courts must defer to state court factual findings, affording a presumption of correctness that a habeas petitioner may rebut only with clear and convincing evidence. Groseclose v. Bell, 130 F.3d 1161, 1163-64 (6th Cir. 1997), cert. denied, _U.S._, 118 S.Ct. 1826 (1998) (citing McQueen v. Scroggy, 99 F.3d 1302, 1310 (6th Cir. 1996), cert. denied, 520 U.S. 1257 (1997)); 28 U.S.C. §2254(e)(1).

The State presented substantial evidence that Richey had a motive for setting the fire; he had opportunity to obtain accelerants to start the fire; he had an opportunity to set the fire; and he made numerous statements implicating himself as the person who in fact set the fire that killed Cynthia Collins. Respondent will set forth the Ohio Supreme Court's findings, which are supported by the record and presumed correct:

> Around 4:15 a.m., on June 30, 1986, in Columbus Grove, Ohio, a raging fire broke out in Hope Collins's second-floor apartment, killing Cynthia

Collins, Hope's two-year-old daughter. Less than an hour before, Hope had left her apartment after Kenneth T. Richey, defendant-appellant, agreed to baby-sit Cynthia. Circumstantial evidence established that while in Hope's apartment, Richey had spread gasoline and paint thinner around the apartment and ignited it.

Richey, Hope, Peggy Price, Candy Barchet, Richey's ex-girlfriend, and a variety of other witnesses to these events lived at the Old Farm Village Apartments in Columbus Grove. Peggy and Hope lived in adjacent second-floor apartments, and Candy lived directly below Hope. All three apartments were in Building or Section "A" at Old Farm Village. Candy and her infant son moved into their apartment around June 15, and she met Richey. Within a few days, Candy and Richey formed a sexual relationship, and Richey frequently told Candy he loved her and "would kill any other guys" she was with.

On June 24, Richey learned that Candy had just been in bed with John Butler, and Richey pulled a knife on Butler. In response, Butler "bounced him around the room a little bit." Just after that fracas, Richey broke his hand by punching a door, requiring a splint.

On Sunday evening, June 29, Candy took her new boyfriend, Mike Nichols, to a party in Peggy's apartment; during the party, Candy kissed Nichols openly and told Richey that she wanted to date Nichols. Richey became upset at this news. When Candy went home, around 1:00 a.m., she asked Nichols to spend the night with her, which he did.

That night, Richey wore his Marine Corps camouflage fatigues and combat boots, and he still had his right hand bandaged in a splint. Some witnesses reported Richey was intoxicated. Jeffrey Kezar recalled Richey saying, "If I can't have her [Candy], nobody else can."

Richey told several persons that Building "A" would burn that night and he would use his Marine training to do that. Robert Dannenberger described Richey as "very upset" and said Richey threatened to blow the place up since he had "learned how to do explosives" in the Marines. Peggy Price became upset, and Richey told her, "Well, instead of blowing it up, I'll torch A Section." Price recalled that Richey said, "Before the night is over, part of A Building is going to burn down." Shirley Baker also recalls Richey saying, "A Building was going to burn * * *." Juanita Altimus, while just outside her own apartment, overheard Richey say on the landing, "Building A was going to burn tonight."

By 2:00 a.m., the party was breaking up, and Richey kept asking Hope if he could spend the night on her sofa. Hope refused. Around 2:20 a.m., June 30, Richey offered to steal some flowers for Peggy from a greenhouse across the street, but Peggy told Richey not to bring them to her.

Between 3:00 and 3:30 a.m., Dennis Smith drove up and asked Hope to go with him. Hope replied she did not have a baby-sitter, but Richey said, "Well, I'll keep an eye on her [Cynthia], if you'll let me sleep on your couch." A neighbor also overheard Hope say to Richey, "Go upstairs with Scootie [Cynthia's nickname] – she's asleep - but don't lock the door because I can't get back in because I don't have a key."

Around 4:15 a.m., neighbors reported bright orange flames and smoke coming out of the Collins apartment, and the fire department responded. Firemen saw several feet of flames from the apartment and deck curl up over the roof. A resident and a fireman both started into the apartment, but the heat and fire were too intense. A fireman then went back in, with oxygen, but he could not find Cynthia and soon ran out of oxygen.

Ultimately, several firemen, with fire hoses and oxygen masks, succeeded in removing Cynthia's body from her burning bedroom. Cynthia died from asphyxia related to smoke inhalation.

When the firemen arrived, Richey was either at the Collins apartment or he arrived shortly thereafter; he was screaming that a child was still inside. One fireman saw him coming out of the apartment, helped him up, and had to restrain him to keep him from going back in. Richey was combative, argumentative, and interfered with efforts to fight the fire and rescue Cynthia. Two deputy sheriffs overpowered Richey and turned him over to Police Chief Thomas Miller to keep him out of the way.

During the fire, Richey asked Nichols, "Why don't we finish it now, since you think you're so bad[?]" Richey also asked Candy if the fire had scared her. When she replied it had, Richey told her, "if he couldn't have me, that nobody would * * *." Altimus reported that Richey, as he looked over the fire damage, drank a beer, laughed, and said, "It looks like I did a helluva good job, don't it."

Richey admitted that he had earlier gotten two plants from the K & J Greenhouse for Candy, and police

found those plants outside Candy's apartment. The K & J owner identified them as having been stolen from his greenhouse. Richey had also offered to steal two plants for Peggy that evening. The K & J owner confirmed that paint thinner and gasoline were kept in two unlocked storage sheds. Gasoline and paint thinner could have been stolen from these sheds; the owner did not know if any was missing.

Assistant State Fire Marshal Robert Cryer concluded from the physical evidence and burn patterns that an accelerant had been used. An accelerant had been poured on the apartment's wooden deck, the fire's point of origin, as well as the living room rug. A smoke detector had been pulled from the ceiling before the fire. The fire was a very fast, hot, intense fire because of the accelerant.

Gregory DuBois, a consulting engineer, agreed that the fire had been caused by arson and that accelerants had been used. One rug sample from the Collins apartment contained gasoline, and another rug sample revealed paint thinner. Wood chips from that apartment's deck also contained paint thinner. However, laboratory tests failed to reveal any accelerants on Richey's fatigues or boots.

Chief Miller interviewed Richey as a witness on the morning of June 30 and also obtained his statement in the afternoon after advising him of his rights. By July 1, the investigation had focused on Richey, and police arrested Richey for arson and took further statements after advising him of his rights. Police tape-recorded an interview of Richey on July 1. Fire Marshal Cryer and Assistant Prosecuting Attorney Randy Bassinger participated in that interview

> In these statements, Richey maintained that he had been drunk on June 30 and did not remember much. However, he denied starting the fire or knowing how it started. He also denied that Hope had asked him to baby-sit Cynthia, and claimed that he had been at his father's apartment when the fire began. Richey did admit that he knew Cynthia was in Hope's apartment; he had stopped and looked in on her while she was sleeping during the party. Richey also claimed that he had secret ways with witnesses so they would not testify against him. In a later statement, he said he would cut the prosecutor's throat.

State v. Richey, 64 Ohio St.3d 353, 353-56 (1992).

The facts as found by the Ohio courts more than amply demonstrate Richey's guilt. Under these circumstances, this Court would err were it to dispense with the presumption of correctness and find that a hearing is mandatory. Mitchell v. Rees, 114 F.3d 571, 577 (6th Cir. 1997) (applying former version of 28 U.S.C. §2254), cert. denied, 522 U.S. 1120 (1998).

Richey has attacked some of the circumstantial evidence of his guilt, but even those attacks fell apart upon closer inspection. Richey continues to rely on the affidavit of Peggy Villearreal (a.k.a. Price), in which she purportedly recanted her testimony that Richey threatened to "torch" part of "A building." Affidavit of Peggy Villearreal [R. 3], p. 4, ¶¶ 19-20.[3] But in her deposition, she claimed that she did not prepare the affidavit and that to be accurate the affidavit should have read that she no longer remembers Richey

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[3] Peggy is also known as Peggy Price, Peggy Villearreal, and Mary Margaret Villearreal.

making the threats, not that Richey in fact did not make the statements. Deposition of Mary Margaret Villearreal [Tab A], pp. 16, 18. Indeed, not only did Villearreal give written statements before trial and testimony at trial that Richey threatened to burn the building down, but even in correspondence with Richey after the trial she reiterated that Richey had made such threats. Deposition of Mary Margaret Villearreal, [Tab A], Defendant's Exhibit 10, p. R000992 ("Shirley told me you didn't remember saying `that before the night was over part of A Building was going to burn down.' You did, then you went in the kitchen and got either a bottle of wiskey (sic) or wine and left. I thought you would hate me forever for having to say it in court").

C. Richey's allegations, even if true, fail to demonstrate actual innocence.

For the most part, Richey ignores the lay witness testimony and circumstantial evidence of his guilt. Thus, this Court must presume correct that Richey had a motive for setting the fire, opportunity to obtain accelerants from the greenhouse while he was stealing flowers, opportunity to set the fire when he babysat the victim, Cynthia Collins, and made threats to commit the crime as well as a statement bragging that he committed the crime. Instead of attacking this evidence, Richey focuses on the experts from the State Fire Marshall's Office.

Richey's actual innocence claims can be distilled into two distinct concepts. He first uses his new expert chemist, Andrew Armstrong, to question the reliability of the State's testimony that the carpet in Hope Collins' apartment contained traces of gasoline and paint thinner and the wood on Hope's balcony contained evidence of paint thinner. Armstrong cannot say that these accelerants are not present in the samples tested by the State - he argues that the evidence available for his review does not conclusively demonstrate

their presence in the samples. And then Richey employs his arson expert, Richard Custer, for the opinion that if Dr. Armstrong is correct that the State's evidence does not show the presence of accelerants, then the State cannot conclusively rule out accidental causes of the fire.

What will become plain to the Court upon review of Richey's experts statements (both in their affidavits and their depositions) is one simple, irrefutable fact: the experts cannot say whether the fire was caused by arson or accident. Given the applicable standard, even when Richey's proposed evidence is accepted as true, he fails to carry his burden of demonstrating actual innocence.

(1) *Dr. Armstrong cannot rule out the presence of accelerants in the samples from Hope Collins' carpet and the wood from her balcony.*

Three of the samples examined by the State's trial experts tested positive for the presence of accelerants. Two different samples of the carpeting from Hope's apartment revealed the presence of accelerants, one sample containing gasoline and the other paint thinner. Arson Crime Laboratory Report, July 28, 1986 (Sample 4 was taken from the carpet and padding from the living room three feet west of the hallway, while Sample 5 was taken from the carpet and padding in the center of the living room carpet). The wood sample from the balcony revealed the presence of paint thinner. Arson Crime Laboratory Report, July 28, 1986 (Sample 7 was from the balcony four inches from the south edge). See generally, Transcript of Proceedings [R. 26] (Vol. III, pp. 831-836) (testimony of Dan Gelfius concerning his lab results).

Dr. Armstrong disputed the State's findings in an April 26, 1996 affidavit as well as a deposition conducted on June 28, 1999. He concluded that, "Based on the available data, paint thinner cannot be identified in Sample 7." Affidavit of

Andrew Armstrong [R. 3], p. 6, ¶16c. As for Sample 5, Dr. Armstrong opined that the State could not say with scientific certainty that the sample contained gasoline because the gas chromatogram produced by the State did not contain the "five peak component pattern" required by a standard adopted three years after the State's testing was performed. Affidavit of Andrew Armstrong [R. 3], p. 7, ¶17a. He conceded that Sample 5 "does correspond slightly to the gasoline standard provided in the 1986 report," but that if it is gasoline it would be a "low level of evaporated gasoline." Affidavit of Andrew Armstrong [R. 3], p. 8, ¶17f.[4] And with respect to sample 4, Custer disputes the State's conclusion that it contained paint thinner because Custer could only discern four of the five necessary alkanes to conclude that paint thinner was present. Affidavit of Andrew Armstrong [R. 3], p. 9, ¶18c. In his deposition, Custer conceded that if he had a greater library of standards to check his results against and was very comfortable with the testing equipment, then he would be comfortable in finding paint thinner in Sample 4 despite the absence of the fifth alkane, though Custer disputed that the State's equipment could provide such comfort. Deposition of Andrew Armstrong [Tab B], p. 71.[5]

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[4] In his deposition, Armstrong stated that a finding of gasoline would not have been indicative of accelerant on the carpet because it was probably contaminated when the carpet was retrieved from the dump and placed on an asphalt surface near a gas pump. Deposition of Andrew Armstrong [Tab B], pp. 85-86. But the photographic evidence as well as the testimony of Steven Stechschulte demonstrate that the carpet was some 35 - 40 feet away from the pump. Deposition of Steven Stechschulte [Tab C], p. 164.

[5] Richey claims that the State led the trier of fact to believe that the two samples containing paint thinner (one from the carpet and one from the wood chips) had the same source, and thus there was no chance of

In his deposition, Dr. Armstrong clarified that his opinion was that, based on the evidence available for him to inspect, the State's experts did not meet their burden of proving the presence of accelerants to a scientific certainty:

- I have one test, one piece of data that survived. And I am trying to state to a scientific certainty something happened. And there is insufficient data to do that. Deposition of Andrew Armstrong [Tab B], p. 59;
- This data does not conclusively prove that it was paint thinner. Deposition of Andrew Armstrong [Tab B], p. 68.
- But there's just not sufficient information in [Sample 4] ... to conclude that this is paint thinner. Deposition of Andrew Armstrong [Tab B], p. 74.
- But he has not scientifically proven that Sample 5 has the stuff in it based on the analytical data that's been presented. He didn't prove his case to a scientific certainty. Deposition of Andrew Armstrong [Tab B], p. 93.

contamination at the dump. Motion for Evidentiary Hearing, p. 11. But Cryer merely offered that both samples contained the same substance (paint thinner), and the fact that paint thimer was found on the wood chips, which had not been taken to the dump, still confirmed the presence of accelerants Transcript of Proceedings [R 25] (Vol. II, Tr. 806). In fact, Cryer conceded that if paint thinner had been dripped on the carpet at the dump there would be no way for him to tell that the paint thinner came from the dump as opposed to being poured on the carpet while in the apartment. Transcript of Proceedings [R. 25] (Vol. II, Tr. 806-807). Also, the State's chemist never opined that the two samples came from the same source, and he admitted that not all paint thinners are the same and that testing would not be able to tell if the sample perfectly matched a known source. Transcript of Proceedings [R. 26] (Vol. III, Tr. 836, 854-855).

At several points Armstrong indicated his frustration at not having all of the records and data concerning the State's tests to evaluate the State's results: "And why not have the records of all of the analyses, of all the appropriate analyses for comparison. I had no solvent blanks available to look at. There's a lot of things I don't have. But I am looking only at this analytical data." Deposition of Andrew Armstrong [Tab B], p. 61.

While Armstrong suggests that the State's tests may have shown the presence of other products (such as lamp oils, insecticides, furniture polish, etc.), he could not rule out that the samples contained accelerants as identified by the State's experts; he merely opines that the State's experts have not sufficiently proven their case.

(2) *Richard Custer cannot rule out arson as a possible cause of the fire.*

In his affidavit, Custer criticized the State's arson investigator, Mr. Cryer, and the support for his conclusion that the fire was caused by arson Custer disputed that the "pour patterns" observed by Cryer were indicative of a poured accelerant, as Custer posited an alternative explanation that could have caused the irregularly shaped patterns. Affidavit of Richard Custer [R. 3], pp. 4-5, ¶10b. Custer also stated that the burning in the grooves of the wood on the balcony was also not necessarily indicative that an accelerant had been poured on that surface. Affidavit of Richard Custer [R. 3], pp. 5-6, ¶10c. And he disputed that the color of the ash and the speed with which the fire spread were accurate indicators of arson. Affidavit of Richard Custer [R. 3], p. 6, ¶10d. Custer then concluded, based on his review of Peggy Price's statement, that the fire was "just, if not more,

likely ... started by the careless discard of smoking materials or child's play." Affidavit of Richard Custer, p. 9, ¶12f.[6]

In his deposition on July 12, 1999, Custer revealed the bases for his opinion. Deposition of Richard Custer [Tab D]. He admitted that he spoke to no witnesses about the case (p. 38); that he read only one lay witness statement (Peggy Price's statement) (p. 39); that he was unable to view the scene as the State's arson investigator did (p. 38); that he may or may not have reviewed statements made by firemen on the scene (p. 36); and that ultimately his opinion was confined to the materials provided to him by Richey's counsel (p. 39).

But even more important than Custer's failure to consider all of the evidence available to the State's arson investigator is the weakness of Custer's ultimate opinion on the cause of the fire. Custer opined that the arson was the result of either careless discard of smoking materials or child's play — not because he found affirmative evidence that this was the cause - rather, this was the probable cause because in his view the State's evidence did not rule it out:

Q: You talked about a dropped cigarette being a likely scenario for the start of the fire; is that right?

A: Yes. That's not been eliminated.

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[6] We find it incredible that Custer would rely solely on Peggy Villearreal's statement (apparently the only one provided by Richey's counsel) for his conclusion of an accidental cause, but not consider the numerous witnesses who testified for the State concerning Richey's motive to set the fire, his access to accelerants, his opportunity to set the fire as the last person in the apartment, and his statements threatening to burn down the building and admission that he set the fire.

Q: Upon what do you base your conclusion that that could be a likely scenario for the cause of this fire?

A: The statements, information relative to the smoking habits of the people who were in there.

Q: Where did that come from?

A: There's evidence that there is a smoker in there.

Q: That doesn't mean she accidentally discarded the smoking material?

A: It doesn't mean that she didn't either.

Q: Without the couch being there, what basis do you have to say that a lit cigarette started the fire?

A: In my opinion that's equally likely that it was incendiary based on the evidence that I've seen, the results of the laboratory tests.

* * * *

Q: Isn't it just as likely that the sofa could have been consumed in the manner you indicated in the photograph in Exhibit 10 resulting from direct flame impingement upon the sofa from the burning carpet in front of the sofa?

A: **It could go either way. There's really no way to tell.**

Q: And there's no way to tell that this was done by virtue of a cigarette in the sofa, is there?

A: **No, from the physical evidence, there's no way to tell either one or the other.**

Deposition of Richard Custer [Tab D], pp. 76-78 (emphasis added).

Custer went on to clarify that he did not even know if his theory that the fire could have originated from a smoldering

cigarette lodged in the sofa is theoretically possible as he did not review photographs of the sofa nor did he know whether the sofa even had cushions between which a cigarette could be lodged. Deposition of Richard Custer [Tab D], pp. 72, 106-107.

Custer also conceded that if the State's experts were correct about their analysis of the carpet and wood from the balcony, then Custer would agree that the fire was caused by arson. Deposition of Richard Custer [Tab D], pp. 78-79.

D. When the Court applies the law to the facts as developed, the Court will find that there is no evidence of actual innocence.

Having reviewed the facts as found by the Ohio courts as well as Richey's "newly-discovered" evidence, the Court will find that Richey fails to demonstrate actual innocence. His evidence does not even purport to exclude the possibility that he set the fire that killed Cynthia Collins - his evidence is only an attack on the State's *scientific* evidence of arson and his conclusion that such evidence is not sufficiently sound to prove that the fire was an arson. And again, to do this Richey needs this Court to ignore the other witnesses who testified at trial to Richey's motive, opportunity, and admissions. This Court cannot exclude the consideration of such evidence in its analysis. Schlup v. Delo, 513 U.S. at 332 (newly presented evidence must be assessed "in connection with the evidence of guilt adduced at trial").

In this respect, Richey's case resembles the one that confronted the court in Satcher v. Pruett, 126 F.3d 561 (4th Cir.), cert. denied, stay denied, 522 U.S. 1010 (1997). Satcher had been sentenced to death for the rape, robbery and capital murder of Ann Borghesani. Id. at 563. At trial, test results revealed that the semen sample recovered from the victim matched Satcher's DNA; the pubic hairs found on the victim did not match Satcher; and other test results were

inconclusive. Id. at 564. In federal habeas, Satcher introduced reports from experts who conducted DNA testing of Satcher's blood to compare to the results obtained by the State's DNA testing of the semen found in the victim. Id. at 570. Satcher's experts concluded that the State could not claim with scientific accuracy that Satcher was a "four-probe" match for the DNA found in the semen and that the State's test results fell outside their own range of match criteria. Id.

The district court and the Fourth Circuit rejected Satcher's actual innocence claims. Of particular relevance to this case, the Fourth Circuit noted that Satcher's new evidence did not demonstrate innocence. Satcher's evidence did "not show that someone else was the source of the DNA sample taken from the crime scene.... None of the experts conclude that Satcher did not contribute the DNA from the sample taken from Borghesani." Id. at 570. "It would be a different matter if, as Satcher argues, his new DNA evidence showed that he was definitely not the contributor of the DNA on the swab taken from the crime scene. **But his new evidence suggests, at best, that Virginia's test was inconclusive**." Id. at 571 (emphasis added).

This is exactly the sum total of Richey's expert opinions – according to them, the State's evidence of accelerants was inconclusive and the scientific evidence of arson was inconclusive. Indeed, Richey's evidence is even weaker than Satcher's. For in Satcher's case, the semen recovered from the victim had to be from the perpetrator, and thus his new evidence went directly to the absolute proof of who committed the crime. Thus, if Satcher's evidence could disprove that he deposited the DNA, he could prove his innocence. In Richey's case, even if one accepts his conclusions as true that the testing for accelerants was inconclusive and the State's arson investigator could not rule out accidental cause, it does not prove Richey's innocence.

The presence of gasoline and paint thinner on the samples tested by the State was not necessary to prove Richey's guilt - in Satcher, on the other hand, the DNA had to be Satcher's to prove his guilt.

Satcher is also instructive on the more narrow inquiry the Court must make in dealing with this motion. The Fourth Circuit held that the district court did not abuse its discretion in refusing to hold an evidentiary hearing because the court reviewed Satcher's evidence and concluded that it did not prove innocence, merely disagreement between the experts:

> The district court refused to have an evidentiary hearing, but it did so only after reviewing the affidavits and concluding that his evidence was not sufficient to show actual innocence. It was within the court's discretion to conclude that the new evidence created only a "disagreement between experts" that would not satisfy the Schlup standard.

Id. at 571 n.5.

In this case, the state courts made a specific finding that the evidence did not support Richey's actual innocence claims:

> Even if the trial experts' analyses of the available data were erroneous, such error does not destroy the state's case against Appellant. Furthermore, the "newly-discovered evidence" presented by Appellant does not by itself establish his actual innocence. The mere absence of accelerants in the articles tested is not conclusive proof that Appellant is innocent of the crime of arson. There is other evidence in the record which supports the verdict of the jury (sic).

State v. Richey, Putnam App. No. 12-97-7, p. 4 (November 18, 1997) [R. 39, Exhibit 77]. Richey's new evidence presents a "disagreement between experts." And even if the disagreement were resolved in Richey's favor, he would still be left without evidence of actual innocence. An evidentiary hearing is therefore not required.

The state courts' findings of facts are still entitled to a presumption of correctness even though there was no evidentiary hearing in the post-conviction proceedings in state court. Mitchell v. Rees, 114 F.3d at 576 (presumption applies to appellate court's statement that "the facts of the present case did not adequately support respondent's claim," quoting Sumner v. Mata, 449 U.S. 539 (1981)); Carter v. Johnson, 110 F.3d 1098, 1106-1107 (5th Cir.) (presumption still applies to state court disposition based on consideration of affidavits without live testimony), cert. granted, vacated and remanded on other grounds, __ U.S. __ , 118 S.Ct. 409 (1997).

III. Richey Is Not Entitled to a Hearing on his Ineffective Assistance of Counsel Claims.

A. Trial counsel's strategy for handling the State's evidence of arson was sound; counsel were not ineffective in relying on an independent, qualified expert and in not "shopping" for a more favorable opinion.[7]

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[7] Before addressing Richey's request for an evidentiary hearing on his ineffective assistance of trial counsel claims, we note that Richey's habeas corpus petition lacks such a ground for relief, though his Introduction mentions ineffective assistance of trial counsel regarding the retention of an independent arson expert, L. Gregory DuBois. Petition for Writ of Habeas Corpus [R. 1], p. 4. We will presume for purposes of this motion that the Court will treat the reference in the Introduction as a ground for relief, or, in the alternative, assume that Richey will file an amended petition as of right that includes such a claim. Fed.R.Civ.Proc. 15(a) ("party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served....").

Richey's ineffective-assistance claim dovetails with his actual innocence claim in the sense that Richey faults trial counsel for not "shopping around" until they found Dr. Armstrong in Texas and Mr. Custer in Maryland. Yet, the state courts made explicit findings on this issue, which are presumed to be correct. Moreover, the discovery conducted in this case confirms that Richey's trial counsel functioned as counsel in the Sixth Amendment sense and did not perform deficiently in their handling of the arson evidence.

The guiding standard for the Court's consideration of this claim is, of course, Strickland v. Washington, 466 U.S. 668 (1984), in which the United States Supreme Court held that any habeas corpus claim of ineffective assistance of counsel must establish both deficient performance and prejudice:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. at 687.

This Court need look no further than the first prong, deficient performance, in dispatching this claim without an

evidentiary hearing. Milone v. Camp, 22 F.3d 693, 703-704 (7th Cir. 1994) (court "need not address both Strickland prongs if it is clear that [defendant] cannot satisfy one of them: There is no need to discuss prejudice if counsel's performance was not deficient, and there is no need to evaluate counsel's performance if there was no prejudice resulting from counsel's actions"), cert. denied, 513 U.S. 1076 (1995).

The lynchpin for Richey's attack on counsel is their reliance on an expert, L. Gregory DuBois, who did not do his own testing.[8] Richey thus attacked the expert as incompetent and attributed that incompetence to trial counsel. The state courts properly rejected this claim. The post-conviction trial court found as a fact that Mr. DuBois was a qualified expert. Findings of Fact and Conclusions of Law [R. 38, Exhibit 73], p. 6, Findings of Fact, ¶3. The court noted that Richey's claim was based on the assertion that DuBois did not conduct any independent testing, so counsel were incompetent for relying upon him. Findings of Fact and Conclusions of Law [R. 38, Exhibit 73], p. 6, Findings of Fact, ¶4. The trial court applied constitutional law to the facts and held that any failings of an expert cannot be directly attributed to trial counsel and that

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[8] Elsewhere in his motion, Richey attacks DuBois' qualifications, Motion for Evidentiary Hearing, pp. 29-30, but Richey did not present this theory to the state courts. Indeed, the post-conviction trial court made a specific finding that Richey did not contest DuBois' qualifications. Findings of Fact and Conclusions of Law [R. 38, Exhibit 73], p. 6, ¶2 ("Richey fails to attack Mr. DuBois' qualifications"). Moreover, in his deposition DuBois revealed his qualifications, which included membership in ASTM. Deposition of L. Gregory DuBois [Tab E], p. 16. Mr. DuBois was also a member of the International Association of Arson Investigators at the time he was retained. Id. at 20. Before 1987, his company was involved in approximately 400-500 fire investigations and DuBois had an active role in "almost all of them." Id. at 42. In 1986 alone, DuBois was involved in ten to thirty arson investigations, id. at 49, and less then one hundred such investigations before 1987 in total. Id. at 158.

trial counsel had no duty to continue to search for an expert to contradict the state's experts when his independent expert agreed with the state. Findings of Fact and Conclusions of Law [R. 38, Exhibit 73], pp. 6-7, Conclusions of Law, ¶¶2-3. On appeal, the state court of appeals agreed that any failings on the part of counsel's expert could not be attributed to counsel in this case and that counsel did not perform deficiently in light of their retention of an expert and strategy in casting doubt on the State's evidence. State v. Richey, Putnam App. No. 12-97-7, p. 6 (November 18, 1997) [R. 39, Exhibit 77].

The Ohio courts reasonably applied Strickland v. Washington to the facts in this case. First of all, there is no such thing as ineffective assistance of an expert witness. Wilson v. Greene, 155 F.3d 396, 401 (4th Cir.), cert. denied, 525 U.S. 1012 (1998). And counsel are entitled to rely upon the opinions given by properly selected experts – there is no duty to continue to "shop" for an expert. The Eighth Circuit affirmed this principle in Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir.), cert. denied, 516 U.S. 849 (1995), where the petitioner used a new expert's opinion to argue that his trial expert performed incompetently by not conducting an adequate evaluation. The court held that Sidebottom was attacking the wrong person — the focus should have been on counsel. Id. With the proper focus, the court held that there was no constitutional violation: "We have never suggested [that] counsel must continue looking for experts just because the one he has consulted gave an unfavorable opinion." Id. (citations omitted). Counsel must be entitled to rely upon their experts, for "if an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous." Hendricks v. Calderon, 70 F.3d 1032, 1039 (9th Cir. 1995), cert. denied, 517 U.S. 1111 (1996). There is no need for an evidentiary hearing

to resolve the claim because the record before the Court already confirms that counsel did not act deficiently.

Not only are the state court's conclusions supported by the record before it, but the discovery in this case has confirmed that counsel did not perform deficiently in their handling of the state's arson evidence. Moreover, Richey's trial expert has now explained why he did not conduct independent testing, which buttresses the state court's conclusions.

Trial counsel William Kluge was responsible for handling the State's arson evidence and he retained DuBois to test the validity of the State Fire Marshall's conclusion that the fire was an arson. Deposition of William F. Kluge [Tab F], p. 13. Richey has questioned the expert's competence for not conducting his own tests, but even Richey's expert agrees that such testing would have been meaningless.

When asked why he did not conduct independent testing of the samples to compare with the state's findings, DuBois could not remember the exact reason for not testing, but he recalled several reasons for why he did not perform the testing. The first reason was that by the time he was reviewing the evidence the

> samples were nearly six months old, and it's my thinking that that probably, in my mind, would have been too long of a time period to reperform the analyses. If I had gotten different results, I wouldn't have known whether or not the difference in the results were because the samples were actually different than what the State Fire Marshall laboratory analyses had shown earlier that year. . . . I wouldn't have known whether or not the differences were because the samples had changed in the six months or whether they were, indeed, different.

Deposition of L. Gregory DuBois [Tab E], p. 84.[9]

The record substantiates DuBois' recollection concerning the time frame because at the point that DuBois met with Kluge and received the State Fire Marshall's reports, more than five months had passed since the fire (June 30, 1986) and more than four months had passed since the state conducted its testing. Deposition of L. Gregory DuBois [Tab E], p. 72 (DuBois received reports on December 4, 1986); Transcript of Proceedings [R. 26] (Vol. III, Tr. 830) (testimony of Dan Gelfius that the State conducted its testing of the samples from the carpet and balcony on July 22, 1986).

Indeed, even Richey's chemist agreed that the State's extraction from the carpet and wood chips "would be good perhaps three months" and by that time would "[m]ore than likely evaporate." Deposition of Andrew Armstrong [Tab B], pp. 87-88. When asked if a five month period would have been adequate to retest from the carpet and wood chips, Armstrong said "Not in this case...." Deposition of Andrew Armstrong [Tab B], p. 88. Having conceded these facts, Armstrong was left with criticizing DuBois for not documenting in the file made available to Armstrong that DuBois had confirmed these facts with a chemist. Deposition of Andrew Armstrong [Tab B], p. 89.

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[9] DuBois gave two additional reasons that may have factored into his decision not to conduct testing. He may have also considered that the potential budget for his work in the case would not have been sufficient to contemplate retesting, and when he visited the State Fire Marshall's Office he may have learned that there was some other scientific reason that a duplicate analysis could no longer be performed. Deposition of L. Gregory DuBois [Tab E], pp. 28, 84-85. Given that the deposition occurred some thirteen years after the fact, DuBois could not recall with certainty.

While DuBois did not conduct futile testing, he did test the State's arson conclusions by examining the photographs, inspecting the arson -lab, their reports, and their evidence used in concluding that accelerants were present in the samples they tested; indeed, he sat down with chemist Dan Gelfius to go over each of the state's conclusions and comparisons. Deposition of L. Gregory DuBois [Tab E], pp. 174, 178.

In light of the opinion from DuBois confirming the validity of the State's finding, Kluge pursued the only reasonable strategy then available to him by concentrating on the State's evidence of the arsonist's identity:

> Well, the first strategy was to hire an expert to review all of the evidence, and having hired an expert and having been assured by him that he reviewed everything Cryer had done, we talked about that, and then at that time, once he confirmed that everything Cryer had done was accurate and appeared to be in order, we decided at that point not to use him. At that time, however, he was there in Putnam County at the time the trial was going on. So to combat the arson diagnosis of Cryer, we really kind of down-played that to the extent that they still had to prove that Kenny is the one who had climbed into the apartment, that Kenny is the one who had stolen the accelerant, that Kenny is the one who poured the accelerant and so forth and started the whole fire. And there was no evidence of that other than circumstantial evidence.

Deposition of William Kluge [Tab F], pp. 20-21; see also Transcript of Proceedings [R. 27], (Vol. IV, Tr. 1028-1057) (defense closing argument).

And contrary to what Richey would have this Court believe, counsel did question whether the carpet could have been contaminated. Transcript of Proceedings [R 26] (Vol. III, Tr. 792-793, 806-807). Moreover, the State on its own disclosed

the location of the carpet before testing. Transcript of Proceedings [R. 25] (Vol. II, Tr. 641-642, 766). Trial counsel also highlighted the lack of any accelerants on Richey's clothing, duffel bag and arm bandage. Transcript of Proceedings [R. 26] (Vol. III, Tr. 840-842).

Richey also assails his trial counsel's strategy regarding the identity of the arsonist by claiming that trial counsel should have blamed the victim for causing the fire. Motion for Evidentiary Hearing, pp. 23-24, 34. To do this, counsel should have introduced evidence that the victim had caused at least one fire before her death. Affidavit of Peggy Villearreal [R. 3], ¶¶9-13; see also Supplemental Discovery (December 18, 1986) [R. 30, Exhibit 9] (indicating an oral statement from Hope Collins that Cynthia had on one occasion used a match to start a fire on a sheet).

There are several problems with this strategy. First of all, the State had evidence of accelerants on the carpet and the balcony and the independent defense expert concurred in the analysis. Second, the fire broke out at around 4:15 a.m., long after the child had gone to sleep. Transcript of Proceedings [R. 24] (Vol. I, Tr. 83) (Hope testified that Cynthia was asleep when Hope got back to the apartment between 11:00 p.m. and 11:30 p.m.). Thus, counsel's theory would have been that despite the presence of accelerants and no explanation for the child's access to same, the child woke up in the middle of the night to set the fire and then return to her room. It was eminently reasonable trial strategy for defense counsel to refrain from attacking the two year-old victim as a firebug in the face of overwhelming and uncontradicted testimony that the fire was caused by the use of accelerants. See Transcript of Proceedings [R. 27] (Vol. IV, Tr. 1028-1057) (trial counsel's closing argument, which centered on identification with recognition that proof of arson was unrefuted; see also pages 1029, 1031, 1043, 1045, 1052, 1056-57, in particular).

B. Trial counsel were not ineffective in their handling of the evidence concerning the smoke detector.

At several points in his motion, Richey attacks trial counsel for not introducing evidence that Hope Collins had disconnected her smoke detector the night of the fire to stop it from beeping while she cooked.[10] Richey claims that this would explain why thee detector apparently did not sound and was hanging from its wires after the fire. Motion for Evidentiary Hearing, pp. 24, 34. Richey relies upon an affidavit from Peggy Villearreal that she informed defense counsel of this information. Affidavit of Peggy Villearreal [R. 3], p. 3, ¶¶14-18.

The first thing to note is that Peggy "thinks" that she told attorney Donohue about this information. Affidavit of Peggy Villearreal [R. 3], p. 3, I N14-18. Coming some seven years after the trial, and considering Peggy's other problems remembering things (see generally Deposition of Mary Margaret Villearreal [Tab A], (containing at least fifty-eight uses of the phrase "I don't remember" when asked about her affidavit and trial testimony)), her uncertainty is hardly credible evidence. Moreover, attorney Donohue testified that not only did he not remember Peggy telling him this,

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[10] Elsewhere in his motion, Richey floats the contradictory theory that the smoke detector was hanging from its wires because it melted away from the housing due to the intense heat. Motion for Evidentiary Hearing, p. 9 (citing Affidavit of Richard Custer, ¶12e). Aside from the obvious inconsistency with the above explanation, Custer was not at the fire scene and appears to rely solely on trial testimony for his melting theory. See id. (citing as the source for his conclusion trial testimony indicating that the smoke detector was hanging down by its wires); compare Transcript of Proceedings [R. 26] (Vol. III, Tr. 813) (testimony from Mr. Cryer that based on his examination of the detector and the ceiling he saw no evidence confirming that heat could have pulled the screws from the detector out of the plasterboard).

Deposition of Gregory W. Donohue [Tab G], pp. 13-14, but his notes with Price do not reflect such information and Donohue said that he would have likely made such a notation if Peggy said that. Deposition of Gregory W. Donohue [Tab G], p. 15.

Even if Peggy did tell counsel about this, it does not explain why the smoke detector did not sound, it in no way refutes the State's theory on how Richey disabled the smoke detector, and it is flatly contradicted by Hope Collins (now Hope Sterling).

At trial, Robert Cryer testified that Hope Collins' smoke detector was found dangling from two wires about eight inches below the ceiling. Transcript of Proceedings [R. 26] (Vol. III, Tr. 753). Hope Collins testified at trial that she believed that the smoke detector was working the day of the fire. Transcript of Proceedings [R. 24] (Vol. I, Tr. 111). At her deposition recently, Hope reaffirmed this belief. Deposition of Hope Sterling [Tab H], p. 58.

Hope also clarified that she did not disconnect the smoke detector to keep it from beeping - there were two ways to stop it from beeping: (1) flip the switch in the fuse box; or (2) fan the smoke away from the detector. Deposition of Hope Sterling [Tab H], p. 84. In neither event did Hope need to pull the smoke detector down from the ceiling. When she had to fan the smoke away from the detector, she sometimes unhooked the cover and let it swing down on its hinges (Deposition of Hope Sterling [Tab H], pp. 42-43, 84), but she did not need to unscrew the smoke detector and let it dangle from its wires.

Peggy's information also does nothing to refute the State's theory that Richey had thrown the smoke detector's breaker in the fuse box. Transcript of Proceedings [R. 26] (Vol. III, Tr. 1059-1060). The State demonstrated at trial that

Richey knew about how to cut off the power to the smoke detector by throwing the breaker in the fuse box. Transcript of Proceedings [R. 24] (Vol.1, Tr. 112-113).

Even Hope's testimony that she sometimes threw the breaker switch to stop the alarm is not helpful to Richey for at least two reasons. First, Hope testified that she would throw the breaker for about fifteen seconds and then turn it back on to reset the alarm. Deposition of Hope Sterling [Tab H], p. 45. Second, even if she left the circuit breaker off, it is highly unlikely that it remained off for the duration of the evening because that breaker also controlled the power to the back half of her apartment, including her lights. Transcript of Proceedings [R. 24] (Vol. I, Tr. 110, 112-113). Hope testified at trial that she returned to her apartment the night of the fire and made herself something to eat in the kitchen at about 2:00 a.m. Transcript of Proceedings [R. 24] (Vol. I, Tr. 91). If the circuit breaker were still off, she would have been doing this in the dark. In any event, Richey does not seem to argue this alternative.

Richey fails to demonstrate that trial counsel were aware of the information concerning the smoke detector, and even if we assume that counsel were aware of this information, it in no way detracted from the State's evidence concerning how Richey disabled the smoke detector. Moreover, to the extent that he is arguing that Peggy's information would have aided in the establishment of a mitigating factor (that Richey tried to save the child), an evidentiary hearing is not available in federal habeas. Burris v. Parke, 116 F.3d 256, 258 (7th Cir. 1997) (interpreting 28 U.S.C. §2254(e)(2) to preclude evidentiary hearings on claims relating to the death penalty in a capital case); Rodriguez v. Zavaras, 42 F.Supp.2d 1052, 1057 (D.Colo. 1999) (citing and discussing Burris and other district courts reaching this conclusion).

C. Richey fails to demonstrate that appellate counsel in his direct appeal to the court of appeals were ineffective, and because he fails to point to any prejudice, there is no need to hold a hearing.

Richey mentions in the course of describing the state proceedings that appellate counsel on direct appeal labored under a conflict of interest that caused counsel Kenneth Murray to be ineffective. Motion for Evidentiary Hearing, pp. 34-35. Both parties pursued discovery in connection with this claim. The depositions constitute a sufficient record for this Court to decide the claim, and thus no hearing is necessary.

Richey relies primarily upon Kenneth Murray's affidavit in support of this claim. Mr. Murray states his belief that his supervisor, David Stebbins, instructed him not to raise claims of ineffective assistance of trial counsel because trial counsel Kluge was Stebbins' friend. Affidavit of Kenneth Murray [R. 3], p. 2, ¶6. This statement is relevant in determining whether counsel performed inadequately, but Murray clarified in his deposition that Stebbins instructed him not to raise ineffective-assistance-of-trial-counsel issues because they would be raised later in the post-conviction proceedings. Deposition of Kenneth Murray [Tab I], p. 28. But the Court need not decide whether there was a conflict at all. For Murray cannot identify a single issue that he purposely left out of the brief because of Stebbins' instructions. Deposition of Kenneth Murray [Tab I], pp. 24, 26; Affidavit of Kenneth Murray [R. 3], pp. 4-5, ¶¶12-15 (discussing claims raised in application for reopening and not listing a single claim that Murray wanted to raise but did not because of Stebbins). Indeed, Murray says that he inserted three or four claims in the brief because "they were hot issues or they were strong in the record." Deposition of Kenneth Murray [Tab I], p. 35.

Richey's failure to point to any specific prejudice means that the Court need not consider the first prong (deficient performance), nor must the Court hold a hearing.

D. Conclusion regarding ineffective assistance of counsel

Richey fails to demonstrate, even if the truth of his assertions are correct, that the Ohio courts' application of Strickland v. Washington principles to this claim was so unreasonable that it would not even be debatable among reasonable jurists, meaning that the Ohio courts' decision was so offensive to Strickland, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes. Nevers v. Killinger, 169 F.3d 352, 362 (6th Cir.), cert. denied, 119 S.Ct. 2340 (1999).

IV. Richey is Not Entitled to an Evidentiary Hearing to Retry All of the Facts in the Case.

Unlike the discrete actual innocence and ineffective assistance of counsel claims that Richey raises in the first section of his motion, section two is a free-ranging request to retry his case. In section II, Richey tells the story of his trial and direct appeal, pointing out along the way his version of the facts and highlighting the facts with which he disagrees. But Richey is simply not entitled to a retrial here to contest the State's evidence again.[11] To the extent that we could

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[11] For example, as will be seen in Respondent's Return of Writ, Richey may be relying upon ground nine of his Petition as support for retrying the scientific evidence of arson. In his Petition, Richey argues that his Fourteenth Amendment rights were violated by the trial experts' use of unreliable scientific methods to arrive at their "false" conclusions. Petition for Writ of Habeas Corpus [R. 1], p. 29 (arguing that because his experts disagree with the State's experts then the State presented false scientific evidence). Richey fails to cite a single case in support of this ground for relief - because there is no such claim. In any event, we address the underlying factual assertions in the claims of actual innocence and ineffective-assistance-of-counsel under the appropriate standards.

discern specific, cognizable grounds for relief in Richey's tale, we identified them in section III above and pointed out why an evidentiary hearing is not required.[12]

V. Conclusion

Richey has not demonstrated that he is entitled to an evidentiary hearing to resolve his claims. The record before this Court, as supplemented by the depositions and documents created through discovery, is sufficient for this Court to make its determination.

Even so, we agree that 28 U.S.C. §2254(e)(2) does not bar an evidentiary hearing in this case. And Richey is correct that even if he does not demonstrate *entitlement* to an evidentiary hearing, this Court may nonetheless retain discretion to order one. Sims v. Livesay, 970 F.2d 1575, 1579 (6th Cir. 1992); but see, Mitchell v. Rees, 114 F.3d at 577 (a "district court is without authority to hold an evidentiary hearing on a matter on which the state court has made findings unless one of the factors contained in [former] §2254(d) applies"). If the Court does order a hearing – despite what we believe to be ample documentary evidence showing that Richey cannot prevail at such a hearing as a matter of law – then we welcome the opportunity to demonstrate that his conviction is sound and that he cannot show any evidence of actual innocence here.

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[12] At page sixteen of his motion, Richey states that "[t]o the extent the Respondent does not contest these facts, Richey is simply entitled to relief based upon them." Perhaps Richey is confused about who bears the burden of rebutting the presumption of correctness that attends the state courts' finding of facts. It is Richey who bears this burden, by clear and convincing evidence, and he cannot meet this burden merely by giving his view of the facts and announcing that any failure to point out the state court's findings entitles him to relief. 28 U.S.C. §2254(e)(1). But, as stated above, we have addressed all claims we could identify lurking in Richey's story.

Respectfully submitted,

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Attorney General

/s/ Michael L. Collyer

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Respondent's Memorandum in Response to Richey's Motion for an Evidentiary Hearing** has been forwarded by regular first class U.S. mail this 10th. day of January, 2000, to counsel for petitioner, Paul E. Nemser and Kenneth J. Parsigian, GOODWIN, PROCTER & HOAR, Exchange Place, Boston, MA 02109.

/s/ Michael L. Collyer

MICHAEL L. COLLYER (0061719)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH T. RICHEY,	)	CASE NO.
	)	1:98CV1418
	)	
Petitioner,	)	JUDGE
	)	PATRICIA A.
	)	GAUGHAN
	)	
v.	)	
	)	
BETTY MITCHELL, WARDEN,	)	ORDER DENYING
	)	MOTION FOR
	)	EVIDENTIARY
	)	HEARING
Respondent.	)	

Introduction

This matter is before the Court upon Petitioner's motion for an Evidentiary Hearing (Doc. 97). Petitioner asserts that an evidentiary hearing is necessary to introduce evidence that the experts who testified during Petitioner's trial gave false testimony and that counsel was ineffective for failing to obtain a competent expert. For the following reasons, the Motion is DENIED.

Facts

Kenneth Richey, Petitioner, filed the instant Motion to support two claims he asserted in his Petition for a Writ of Habeas Corpus. During Richey's direct appeal, the Ohio Supreme Court found the following relevant facts: Richey, Hope Collins, Collins' two-year-old daughter, and Candy Barchet, Richey's ex-girlfriend, all lived in the Old Farm Village Apartments in Columbus Grove, Ohio. *State v.*

Richey, 595 N.E.2d 915, 918 (Ohio 1992). Collins' apartment was directly above Barchet's apartment.

During their relationship, Richey stated to Barchet that he would "kill any other guys" if found with Barchet. *Id.* On the night of June 29, 1986, Hope Collins hosted a party that Richey, Barchet, and Barchet's new boyfriend attended. *Id.* at 919. Richey was visibly upset by their presence. *Id.* In fact, witnesses testified at trial about Richey's demeanor during the party and that he at one point stated, "If I can't have her, nobody else can." *Id.*

On that same night, Richey offered to break into K & J Greenhouse to obtain plants for one of the party guests. *Id.* Richey admitted to breaking into that establishment on a prior occasion to steal plants for Barchet. *Id.* The owner of K & J Greenhouse kept paint thinner and gasoline in two unlocked storage sheds. *Id.* at 920. The owner was uncertain whether any of these materials were missing from his premises. *Id.*

As the party concluded, Richey asked Collins several times if he could sleep on her couch. *Id.* at 919. Although she initially refused, she relented when Richey promised to babysit her sleeping daughter, Cynthia. *Id.* Around 4:15 am., neighbors reported smoke coming from the Collins apartment. *Id.* When firefighters arrived, Richey was screaming that a child was inside. *Id.* Firefighters were forced to restrain Richey from trying to enter the burning building. *Id.* Witnesses testified during trial that upon viewing the fire Richey stated, "It looks like I did a helluva good job, don't it" and made other incriminating statements to Barchet. *Id.*

During Richey's trial, several experts testified regarding the cause of the fire. Assistant State Fire Marshal Robert Cryer determined by the burn patterns that an accelerant had been used. *Id.* at 920. He further testified that the smoke detector had been pulled from the ceiling before the fire. *Id.*

He concluded that accelerant had been poured onto Collins' wooden deck, the point of origin of the fire, and onto her living room rug. *Id.* Richey's clothing, however, did not contain any traces of accelerants. *Id.* Gregory DuBois, a consulting engineer who Richey's counsel had initially retained to examine the test results, also testified at trial. *Id.* He concurred with Cryer that gasoline and paint thinner had been used as accelerants in the ignition and rapid spread of the fire. *Id.*

A three judge panel convicted Richey of all charges. *Id.* Richey unsuccessfully appealed the conviction to the Ohio Court of Appeals, the Ohio Supreme Court, and the United States Supreme Court. *State v. Richey*, 1989 WL 156562 (Ohio Ct. App. Dec. 28, 1989); *State v. Richey*, 595 N.E.2d 915 (Ohio 1992); *Richey v. Ohio*, 517 U.S. 1119 (1996). Thereafter, Richey filed a Petition to Vacate or Set Aside his Sentence pursuant to Ohio Rev. Code § 2953.21. Pet. Check., Tab 40. The court denied the petition on March 26, 1997,. pursuant to the State's Motion for summary judgment, without an evidentiary hearing. On May 14, 1997, the post-conviction court entered its findings of fact and conclusions of law. *State v. Richey*, No. CR86-21, slip op. at 4 (Ohio Ct. Common Pleas May 14, 1997).

In Richey's Opposition to the State's Summary Judgment Motion, Richey asserted, for the first time, that the court should grant him an evidentiary hearing because expert testimony proffered during trial was false based on reports he obtained from Professor Richard Custer, a fire investigator, and Dr. Andrew Armstrong, a Certified Professional Chemist. *Id.* Richey claimed that his newly obtained reports proved his actual innocence of Cynthia Collins' murder. *Id.* The post-conviction court denied that claim on several grounds. First, the court barred the claim as res judicata as it could have been raised on direct appeal. *Id.* Second, the court determined that

because Richey failed to raise an actual innocence claim in his post-conviction petition, this new claim was tantamount to an improper amendment of his petition. Finally, the court claimed that even if this claim were properly presented to the court, an actual innocence claim is not cognizable under Ohio law. *Id.* (citing *State v. Lott*, No. 66388 (Ohio Ct. App. Nov. 3, 1994)).

In addition to his actual innocence claim, Richey also requested an evidentiary hearing to prove his counsel was ineffective. Richey stated trial counsel was ineffective for: (1) failing to retain an expert who found the fire was not caused by arson; (2) failing to procure an expert to rebut the State's arson evidence; (3) listing DuBois as a defense expert even after learning DuBois's report was unfavorable to the defense; and (4) failing to call an expert to testify on Richey's behalf. *State v. Richey*, No. CR86-21 at 5-9. Nevertheless, the court denied Richey's Motion for an Evidentiary Hearing and granted the State's Summary Judgment Motion, finding some claims barred by res judicata and others insufficient on the merits. *Id.*

Standard of Review

To secure an evidentiary hearing, a state habeas corpus petitioner must first demonstrate that 28 U.S.C. § 2254(e)(2) does not bar an evidentiary hearing. That statute states:

> (e)(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court **shall not** hold a hearing on the claim unless the applicant shows that–
>
> (A) the claim relies on–
>
> (i) a new rule of constitutional law, made retroactive to cases

> on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2)(emphasis supplied).

While the Sixth Circuit has yet to interpret this statute, several other circuit courts have done so. In *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998), the Fourth Circuit determined that "a federal court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has 'failed to develop the factual basis of a claim in State court.'" If a petitioner has not so developed the claim, then the court must deny a hearing absent one of the two narrow exceptions listed in sections (A) and (B) of the statute. *Id.* Honing in specifically on what constitutes a petitioner's "failure to develop the facts," the Fifth Circuit determined that the phrase "failed to develop" implicates some omission by the petitioner. *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998). Hence, the petitioner "cannot be deemed to have failed to develop a factual basis for his claim if the basis was left undeveloped through no fault of his own." *Id.* Other circuit courts deciding this issue have joined the Fourth and Fifth Circuits in holding that some inaction on

the petitioner's part must be present to preclude an evidentiary hearing. *See Burris v. Parke*, 116 F.3d 256 (7th Cir. 1997)(holding § 2254(e)(2) does not bar district court from granting hearing when state court refused to hear petitioner's collateral attack on sentence); *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997)(concluding Anti-Terrorism and Effective Death Penalty Act ("AEDPA") did not preclude a federal evidentiary hearing merely because state court refused to conduct hearing); *Love v. Morton*, 112 F.3d 131 (3rd Cir. 1997)(determining 28 U.S.C. § 2254(e)(2) did not prevent evidentiary hearing when factors beyond petitioner's control caused failure to develop state court factual record).

Clearing the initial § 2254(e)(2) hurdle, however, does not entitle a habeas petitioner to a hearing. Instead, a court must then subject the petitioner's request to the standard articulated under pre-AEDPA law in *Townsend v. Sain*, 372 U.S. 293 (1962). In *Townsend*, the Court enunciated six circumstances in which a habeas court must grant a petitioner's request for an evidentiary hearing:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313. *Townsend* was partially overruled by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). In *Keeney*, the Court held that a habeas petitioner must show both cause and prejudice for failing to fully develop the facts in state court. Aside from

the *Townsend* and *Keeney* mandates, however, a habeas court may use its discretion in determining whether an evidentiary hearing is necessary. R. Governing Section 2254 Cases 8.

Discussion

Although the post-conviction court refused to grant Richey a hearing, Richey did attempt to develop the factual basis for his claims in state court. Thus, according to prevailing law, Richey is not barred from obtaining an evidentiary hearing. Under *Townsend* and *Keeney*, however, the Court need not grant Richey an evidentiary hearing because the need for a hearing is obviated by utilizing other means of obtaining the proffered evidence for the record.

Specifically, the Court already has permitted, and counsel has taken, numerous depositions in this case pursuant to Rule 6. (Docket Nos. 42, 44, 49, 71, 83, 84). The Court may, in its discretion, order the expansion of the record pursuant to Rule 7, to include "additional materials relevant to the determination of the merits of the petition." R. Governing Section 2254 Cases 7(a); *see also Ford v. Seabold*, 841 F.2d 677, 691 (6th Cir. 1988)(noting that expansion of the record pursuant to Rule 7 within the sound discretion of the district court). Expansion of the record in this case would avert the need for an evidentiary hearing as all evidence Richey proffers has been obtained through either depositions or affidavits.

Courts have eschewed holding evidentiary hearings in cases where, as here, the evidence presented does not involve issues of credibility. Noting that "a court may employ a variety of measures in an effort to avoid the need for an evidentiary hearing," the Supreme Court determined in *Blackledge v. Allison*, 431 U.S. 63, 81 (1977), that a habeas court properly denied the petitioner's evidentiary hearing motion. Following this precedent, the Seventh Circuit determined that a capital habeas corpus petitioner was not

entitled to an evidentiary hearing to assert a jury bias claim because counsel already had interviewed the juror and a transcript of that interview was submitted for court review. *Porter v. Gramley*, 112 F.3d 1308, 1318 (7th Cir. 1997). Enumerating the evidence that Rule 7 would permit a court to incorporate into the record, the *Porter* court reasoned that "the *Townsend* requirement of a hearing cannot be taken literally, since we know that the district court may employ a variety of measures in an effort to avoid the need for an evidentiary hearing on disputed facts." *Id.* at 1317 (citations and internal quotation marks omitted).

In the instant case, Richey maintains an evidentiary hearing is necessary to develop his actual innocence and ineffective assistance of counsel claims. Specifically, Richey desires the Court to hear the testimony of his newly acquired experts, Professor Richard Custer and Dr. Andrew Armstrong. Both of these experts have prepared reports, submitted affidavits, and were deposed by Respondent during discovery. Additionally, counsel took depositions from all experts who testified during Richey's trial, including DuBois, deposed several trial witnesses, and Richey's trial counsel.[1] Richey also has obtained affidavits from appellate counsel asserting their own ineffectiveness. Although Richey claims that this list is not exhaustive, Pet. Br. at 10, n.6, it remains Richey's burden to articulate the factual disputes on which the need for an evidentiary hearing arises.

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[1] Respondent has pledged to file the original deposition transcripts in its possession pursuant to Rule 7. Resp. Br. at 4, n.2. The Court need not await such action, however, as it may, *sua sponte*, expand the record to include such documents. R Governing Section 2254 Cases 7(a).

Finally, Richey cites to *Siripongs v. Calderon*, 35 F.3d 1308 (9th Cir. 1994), to support his assertion that a habeas court must grant an evidentiary hearing once the petitioner presents it with a cognizable claim for relief. What Richey overlooks, however, is that in *Siripongs*, the Ninth Circuit determined that a hearing is required for a habeas petitioner "who asserts a colorable claim to relief, and who has never been given the opportunity to develop a factual record on that claim..." *Id.* at 1310. Because Richey has been given extensive opportunities to develop the factual record, *Siripongs* is inapposite and a hearing is unnecessary.

Conclusion

For the foregoing reasons, Petitioner's Motion for an Evidentiary Hearing is denied. The Court will, on its own Motion, exercise its authority pursuant to Rule 7 and expand the record to include all discovery taken.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
UNITED STATES DISTRICT JUDGE

DATED: 3-27-00